IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	CIVIL ACTION NOS.
	)	99-30225, 99-30226, 99-30227-MAP
	)	(consolidated cases)
Plaintiff,	)	
	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' MEMORANDUM IN SUPPORT
OF MOTION TO ENTER CONSENT DECREE

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Plaintiff, the United States of America, respectfully submits this Memorandum in Support of its Motion to Enter the Consent Decree lodged with this Court on October 7, 1999.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff, the United States of America, by motion filed on this date has asked this Court to approve and enter as a final judgment the Consent Decree lodged in these consolidated cases on October 7, 1999. The proposed Consent Decree (the "Consent Decree", "Decree", or "Settlement") resolves certain liability of Defendant General Electric Company ("GE") to the United States, the Commonwealth of Massachusetts, and the State of Connecticut (collectively "Plaintiffs") for claims asserted in these actions related to the GE-Pittsfield/Housatonic River Site ("Site"), in exchange for GE undertaking obligations as specified in the Decree. GE's obligations include the following: performing and completing a massive cleanup of contaminated soil and river sediments, reimbursing potentially over $70 million in costs incurred at the Site by the governments, and providing both payment of damages and performance of restoration and cleanup work to compensate for natural resources injuries. The value of the proposed settlement to the United States is estimated at $300-700 million.

The complaints in this matter were filed on October 7, 1999. The United States' complaint alleges claims on behalf of the U.S. Environmental Protection Agency ("EPA"), the National Oceanic and Atmospheric Administration ("NOAA"), and the U.S. Department of the Interior ("DOI") under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607, Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, and Section 309 of the Clean Water Act ("CWA"), 33 U.S.C. § 1319, relating to GE's operations and use of

polychlorinated biphenyls ("PCBs") at its facility in Pittsfield, Massachusetts. Massachusetts and Connecticut filed complaints under CERCLA and state law. The City of Pittsfield and the Pittsfield Economic Development Authority ("PEDA") have been joined as parties to this action. The proposed Consent Decree was lodged on October 7, 1999. Notice of the lodging of the Consent Decree was published in the Federal Register on October 26, 1999, 64 Fed. Reg. 57654. The original comment period was 60 days. In response to public request, on December 7, 1999, the comment period was extended to January 26, 2000. 64 Fed. Reg. 68374. Finally, on January 27, 2000, after receiving further requests for additional time to provide written comments on the proposed Consent Decree, the United States agreed to a final extension of time to February 23, 2000. 65 Fed. Reg. 4439. The overall public comment period was 120 days, from October 26, 1999, to February 23, 2000.

In all, the United States received timely submissions from approximately one hundred commenters, including comments favoring entry of the Consent Decree.[1] After giving full and fair consideration to all the comments received, the United States has determined that it should go forward with the settlement because the Consent Decree is fair, reasonable, consistent with the goals of CERCLA, RCRA and the CWA, and in the public interest. As explained in the United States' Responses to Comments on the Proposed Consent Decree ("Responses to Comments"),[2] and in more detail below, the concerns expressed in the public comments do not

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[1] Additional comments were submitted after the close of the comment period.

[2] The comments are included in Exhibit 1 to this Memorandum. Responses to the comments submitted are included in Exhibit 2 to this Memorandum. Declarations relating to the information set forth in this Memorandum or the Responses to Comments are included as Exhibit 3 to this Memorandum. For ease of reference, the United States has also compiled a chart which

justify rejection of the Consent Decree. Accordingly, the United States requests that this Court enter the Decree as a final judgment pursuant to Fed. R. Civ. P. 54(b) and 58.

Environmental settlements are highly favored as ways to protect human health and the environment and promote prompt resolution of disputes. Settlements should be approved if they are fair, reasonable, consistent with statutory goals and in the public interest. This settlement meets all of those criteria.

First, the settlement is fair. The process to arrive at the settlement was fair. The parties engaged in vigorous, lengthy negotiations. The governments made great efforts to solicit public input on cleanup and natural resource damage issues and incorporated that input into their settlement positions. The fact that the negotiations were not "open to the public" does not mean that they were not fairly conducted. The United States may engage in confidential negotiations, just as any other party.

Not only was the process to arrive at the settlement fair, the substance of the settlement is fair. Under the terms of the Decree, GE will undertake a comprehensive cleanup program to address the contamination at the Site. GE also will reimburse the United States for the lion's share of its costs, past and future for the Site. GE also will pay over $15 million for natural resource damages and undertake additional protection, restoration and enhancement projects related to affected natural resources. In return, GE receives a release from certain liabilities related to the Site. That release is tailored to the facts and circumstances of this case and fairly

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delineates the specific comment, the signatory to the comment, and the locations within the Responses to Comments where a response to such comment is found. Exhibit 4.2. A separate chart (Exhibit 4.1) identifies each comment that is addressed in each response.

reflects the equities. GE also will enjoy the benefit of contribution protection, as provided by the statute, for the matters addressed in the settlement. The Decree defines the matters addressed to provide protection that is fair to GE as well as to those who are not parties to this action.

Not only is the settlement fair, it is reasonable. Reasonableness is evaluated in three ways: technical adequacy, adequacy of the settlement to compensate the public; and how well the settlement reflects litigation risks and other considerations. The Decree passes these tests with flying colors. First, the various response actions that have been and will be performed at the Site are adequate to address the contamination. EPA used its best technical judgment and selected a series of response actions that will be protective. The various concerns identified by commenters were considered by the Agency and do not raise any serious issues.

Second, the settlement adequately compensates the public. The United States will recover 90 - 97% of the expected Site costs through cost recovery and work. In addition, the Decree includes a natural resource damage package worth over $25 million. The overall settlement goes far beyond what would be required to demonstrate adequacy of compensation.

Third, the settlement appropriately reflects litigation risks and other considerations. While the United States believes it would prevail in litigation of this matter, that process would take years and expend significant resources and funds. GE has articulated various arguments that it would make concerning the response actions and natural resource damage claims that are technically as well as legally complex. The proposed settlement fairly reflects the challenges that would be faced by the parties in any such litigation.

In addition to being fair and reasonable, the settlement is faithful to the objectives of CERCLA, RCRA and the CWA, and in the public interest. All three statutes are designed to

address contamination and protect human health and the environment. The settlement, by providing for comprehensive and expeditious cleanup of the Site, satisfies that objective. It also meets the objectives of providing a prompt resolution of environmental disputes. Satisfaction of these statutory goals satisfies the public interest.

The Decree is fair, reasonable, consistent with CERCLA, RCRA, and the CWA and in the public interest. Thus, this Court should grant the United States' motion and approve the Decree. The Court should enter the Decree as a final judgment pursuant to Fed. R. Civ. P. 54 and 58 to provide finality and because it is a complete resolution of the issues between the parties.

II. FACTUAL BACKGROUND

This matter relates to the releases or threatened releases of hazardous substances, wastes, and/or constituents, including, but not limited to, polychlorinated biphenyls ("PCBs"), from the GE facility in Pittsfield, Massachusetts into surrounding areas, including the East Branch of the Housatonic River (the "River"), and the River below the confluence of its East and West Branches (collectively the "Site"). The Site includes the following areas: the GE Plant Area, which is the current and former GE facility in Pittsfield and certain adjacent areas; the Former Oxbow Areas, which are properties located where oxbows of the River formerly flowed, but which have since been isolated from the channel of the River and filled; the Allendale School property in Pittsfield; residential and non-residential properties within the floodplain of the River, both in Pittsfield and downstream; Silver Lake, a 26-acre Massachusetts Great Pond located adjacent to the GE Plant Area; the Upper ½ Mile Reach, a portion of the River immediately adjacent to the GE Plant Area, from Newell Street to Lyman Street in Pittsfield; the

1 ½ Mile Reach, a ion of the River immediately downstream of the Upper ½ Mile Reach, from Lyman Stree ne confluence of the East and West Branches of the River; the Rest of the River, including s nt and floodplain areas downstream of the confluence of the East and West Branches of iver, to the extent they are areas where contaminants from the GE Plant Area have migrate are being investigated and/or remediated under the Decree; and other properties or areas extent they are areas where contaminants from the GE Plant Area have migrated and are b nvestigated and/or remediated under the Decree.[3]

A. Gen Electric's Ownership And Operation Of The Site

Since 1903, as owned a significant portion of land at the Site, and has also operated various manufacturi nd office facilities at large portions of the Site. During its operation of facilities at the Site. used various hazardous substances, including, but not limited to, PCBs, as part of its manufa ing operations. GE's use of PCBs started in approximately 1932 and continued until approximately 1977. GE disposed of these PCBs, and other hazardous substances, at the GE facility area, and these PCBs, and other hazardous substances, have come to be located in and around the Site, including at the GE Plant Area, in the Former Oxbows, at the Allendale School property, in and around Silver Lake, on residential and non-residential properties in the floodplain of the River, and in the sediments and bank soils of the River.

During the late 1930's and early 1940's, approximately one and one-half miles of the River were straightened and channelized to reduce flooding. This action resulted in eleven

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[3] Exhibit 5 to this Memorandum is comprised of three maps that depict the Site. Appendix A to the Decree is a further series of maps which delineate the Site. See also Decree, ¶ 4 for more specific definitions of the Site, and each area within the Site.

oxbows being isolated from the River channel. Some of these oxbows were filled with material later found to be contaminated with PCBs from GE's facility, as well as material from other sources.

B. Contamination At The Site And The Governments' Response

Due to the decades of disposal of PCBs and other hazardous substances, contamination now is widespread in soils, groundwater, and River sediments throughout the Site at levels exceeding those deemed protective of human health and the environment. PCBs have been found to cause cancer in animals, and are classified by EPA as a probable human carcinogen. Decree, Appendix D at 25. The existence of the contamination at the Site, including in the River has been a matter of widespread public knowledge for decades.

Beginning in 1977, and in every year since then, the Connecticut Department of Health Services (now Department of Public Health) has issued a Fish Consumption Advisory for consumption of any fish from the Housatonic River in Connecticut based on the presence of elevated levels of PCBs in fish tissue. At various times since 1977, warning signs were posted along the Housatonic River advising against eating fish from the River due to PCB contamination.

During the early and mid-1990s, both the Massachusetts Department of Environmental Protection ("MADEP") and EPA issued Administrative Orders to GE pursuant to M.G.L. c. 21E and Section 106 of CERCLA, 42 U.S.C. § 9606, respectively, requiring GE to undertake cleanup of certain areas of the Site.[4] In addition, a permit issued by EPA pursuant to RCRA,

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[4] On May 22, 1990 and June 29, 1991, MADEP issued to GE, and GE consented to, two Administrative Consent Orders (the "ACOs"). The ACOs require GE to perform response

which became effective on January 3, 1994, required GE to undertake corrective action activities relating to the GE facility in Pittsfield, and other related areas. GE has been performing investigations and cleanup activities pursuant to the RCRA permit and the ACOs. In February 2000, EPA notified GE that EPA had determined that all the work required by the Building 68 UAO had been satisfactorily completed, subject to GE completing continuing 'post-removal site control' obligations.

On September 25, 1997, by publication in the Federal Register, EPA proposed the Site for placement on the National Priorities List, 62 Fed. Reg. 50450, pursuant to 42 U.S.C. § 9605. The National Priorities List is a national list of hazardous wastes sites posing the greatest threat to health, welfare, and the environment.

In 1997, MADEP required GE to investigate and remediate residential properties on which unacceptable levels of PCB-contaminated fill material had been found. Pursuant to these requirements, since 1997, GE, under MADEP approval, has remediated over 100 residential fill properties. Exhibit 5.4, Declaration of J. Lyn Cutler. That program is continuing.[5/]

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actions pursuant to M.G.L. c. 21E at certain areas of the Site. On December 10, 1996, EPA issued a unilateral administrative order to GE under Section 106 of CERCLA, 42 U.S.C. § 9606, directing GE to remove highly contaminated material from an area adjacent to the Houstatonic River known as "Building 68," as well as certain adjoining River bank soils.

[5/] The residential fill cleanup program is not governed by the proposed Consent Decree.

On May 26, 1998, EPA issued an Action Memorandum authorizing a Removal Action in the Upper Reach of the River, which includes the Upper ½ Mile Reach, from Newell Street to Lyman Street, and the 1 ½ Mile Reach of the River (immediately downstream of the Upper ½ Mile Reach) from Lyman Street to the confluence of the East and West Branches (the "Upper Reach Action Memorandum"). Decree, Appendix B. In the Upper Reach Action Memorandum, EPA determined that the following activities are necessary:

-implement temporary measures to limit access and exposure to contaminated sediments, banks and floodplain soils in the Upper Reach;

-mitigate current and potential sources of contamination from entering into the East Branch of the River ("Source Control");

-develop monitoring plans to assess compliance with the objectives for the Source Control; and

-remove contaminated sediments and bank soils from the Upper ½ Mile Reach.

The Upper Reach Action Memorandum also authorized performance of an Engineering Evaluation and Cost Analysis ("EE/CA") for the 1 ½ Mile Reach. The Upper Reach Removal Action (excluding the EE/CA) is designed to eliminate or mitigate existing potential sources of contamination to the River; prevent recontamination of previously remediated floodplain properties and the further contamination of other floodplain areas; prevent the downstream migration of contaminated sediments and riverbank soils; and mitigate the human health and environmental threat posed by the existing high levels of PCBs and other hazardous substances in river sediments, banks and floodplain soils in the Upper ½ Mile Reach. Id. at 2. In the EE/CA, EPA is evaluating alternatives to mitigate the human health and environmental threat

posed by the existing high levels of PCBs and other hazardous substances in River sediments, banks and floodplain soils in the 1 ½ Mile Reach. Id. at 2.

On June 3, 1998, EPA issued to GE a Unilateral Administrative Order ("1998 UAO" or "1998 Order") pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, obligating GE to perform the removal action in the Upper ½ Mile Reach. EPA delayed the effective date of the 1998 UAO to allow for negotiated resolution of Site claims. Substantially all the work required by the 1998 UAO has been or is being performed by GE pursuant to the Consent Decree. GE and EPA completed the temporary measures in September 1998. A majority of the Source Control work has been and continues to be implemented by GE in accordance with numerous EPA-approved Source Control submittals. See Decree, Appendix E, Annex 2. The remainder of the required Source Control activities are included in the Statement of Work for the Removal Actions Outside The River. Decree, Appendix E. The removal of contaminated sediments and bank soils from the Upper ½ Mile Reach is in progress pursuant to the Decree, and the Upper ½ Mile Reach Removal Action Work Plan. Decree, ¶¶ 16, 20, and Appendix F.

From May 5, 1999 through June 4, 1999, EPA provided a public comment period, including hosting a public meeting, to solicit public comment on a proposal for implementation of removal actions at the Allendale School, the Upper ½ Mile Reach, and On-Plant Consolidation Areas which GE agreed to implement prior to entry of the proposed Decree. GE's work plans for these actions were made available to the public for review. In October 1999, EPA issued a Responsiveness Summary to respond to public comments received during that public comment period.

On July 12, 1999, EPA issued an Action Memorandum authorizing a Removal Action at

the Allendale School ("Allendale Action Memorandum"). Decree, Appendix C. The Allendale Action Memorandum provided for excavation of all soils at the Allendale School property in which PCBs had been detected at concentrations exceeding 2 parts per million ("ppm"), except within an approximate 25-foot wide strip along the rear portions of the school building where the soils were to be removed to achieve an average of less than 2 ppm. Id. Following issuance of the Allendale Action Memorandum, GE performed the Allendale School Removal Action, pursuant to the proposed Consent Decree. Decree ¶ 16. As part of the Allendale School Removal Action, GE removed approximately 42,000 cubic yards of soil. GE completed the Removal Action in 1999. Exhibit 3.3, Declaration of Chester Janowski at ¶ 6.

On August 5, 1999, EPA issued an Action Memorandum ("Removal Actions Outside the River Action Memorandum") authorizing removal actions at twenty-four additional areas on the Site, including ten removal actions at the GE Plant Area, five removal actions at the Former Oxbow Areas, three removal actions in the River Floodplain, removal actions at five Groundwater Management Areas, and a removal action at Silver Lake (collectively the "Removal Actions Outside the River"). Decree, Appendix D. The Removal Actions Outside the River are to address soil, sediment and/or groundwater contamination present at the Site in the above-referenced areas. Id. at 7. Pursuant to Paragraph 16 of the Consent Decree, GE has submitted Work Plans for four of the Removal Actions Outside the River, has submitted the Field Sampling Plan/Quality Assurance Project Plan portions of the Project Operations Plan, has submitted a Baseline Monitoring Program Proposal for one Groundwater Management Area, and is continuing source control investigation, design and implementation activities. Exhibit 3.1, Declaration of Bryan Olson at ¶ 5. Further performance by GE of requirements for the Removal

Actions Outside the River is dependent on entry of the Consent Decree. Decree, ¶ 16.

In October 1999, pursuant to Paragraph 16 of the Consent Decree and the approved work plan, GE initiated performance of the Removal Action for the Upper ½ Mile Reach of the River under EPA oversight. Decree, Appendix F (Removal Action Work Plan for Upper ½ Mile Reach Removal Action). As of May 22, 2000, in implementing the Upper ½ Mile Reach Removal Action, GE had excavated approximately 3,580 cubic yards of contaminated sediments and bank soils, and had also removed approximately 1,750 gallons of Non-Aqueous Phase Liquids ("NAPLs") from the River.[6] Exhibit 3.2, Declaration of Dean Tagliaferro at ¶ 4.

In December 1999, MADEP notified GE of PCB contamination in sediments of the West Branch of the Housatonic River and required GE to submit for MADEP review and approval a scope of work that addressed the following: to define the nature and extent of sediment contamination in portions of the West Branch; to delineate the extent of the PCB sediment 'hot spot' in the West Branch adjacent to Dorothy Amos Park; and to evaluate the groundwater beneath Dorothy Amos Park as a potential source of PCB contamination to the West Branch sediments.[7] Exhibit 3.4, Cutler Declaration.

On March 1, 2000, at a meeting of the Citizens Coordinating Council, [8] EPA solicited

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[6] NAPLs are oil or oil-like materials that do not dissolve in water. Dense Non-Aqueous Phase Liquids, or DNAPLs, are heavier than water and sink through the water column; Light Non-Aqueous Phase Liquids, or LNAPLs, are lighter than water and float on the water.

[7] Activities related to the West Branch are not governed by the proposed Consent Decree.

[8] The Citizens Coordinating Council ("CCC") is a group of over 30 environmental, community and business leaders from Berkshire County and Connecticut established by EPA in November 1998. The CCC meets monthly, its meetings are open to the public, and it provides a forum for discussion on the status of cleanup activities, and for ensuring citizen input on the ongoing

public input concerning the 1 ½ Mile Reach draft EE/CA. Exhibit 3.3, Janowski Declaration at ¶ 7. In May 2000, following consideration of the comments of GE and other members of the public on the draft EE/CA, EPA sought review by EPA's National Remedy Review Board of the draft EE/CA.[9] Exhibit 3.3, Janowski Declaration at ¶ 8. In July 2000, EPA issued the final EE/CA and a proposed Removal Action for the 1 ½ Mile Reach for a public comment period in excess of 30 days. Exhibit 3.3, Janowski Declaration at ¶ 9; Decree ¶ 21.a(v). Following consideration of public comments received on the EE/CA and proposed Removal Action, EPA will select a Removal Action for the 1 ½ Mile Reach. Decree ¶ 21.

EPA is currently conducting investigations relating to the Rest of the River. For example, EPA is performing human health and ecological risk assessments, including performing extensive sampling. Exhibit 3.1, Olson Declaration at ¶ 15. In addition, EPA is conducting modeling on the fate, transport and bioaccumulation of PCBs in the Rest of the River. EPA expects to be in a position to select the response action for the Rest of the River in 2003. Id.

C. Negotiations Among The Parties

The proposed Consent Decree is the product of several years of intense, arms length and vigorous negotiation. Because of the widespread PCB contamination at the Site that was then being addressed under a number of different state and federal regulatory mechanisms, beginning in 1995, the governments attempted to begin negotiations with GE seeking a comprehensive

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cleanups.

[9] The National Remedy Review Board is an internal EPA management-level board that evaluates proposed EPA response actions prior to issuance for public comment with the objectives of helping control response costs and promoting consistent and cost-effective decisions.

cleanup and natural resource damage settlement. The parties to this action began negotiations in the fall of 1997 with the assistance of two mediators. In October 1998, the parties reached a tentative agreement in principle. In November 1998, the United States, Massachusetts, Connecticut, the City, PEDA and GE initiated mediated negotiations on a Consent Decree to memorialize the agreements reached among the parties. After hard-fought negotiations dealing with a multitude of complex and sometimes novel issues, the parties reached agreement on the proposed Consent Decree that was lodged on October 7, 1999.[10] The settlement effort required thousands of hours of effort by representatives of EPA, NOAA, DOI, and the Department of Justice for the United States; representatives of the Attorney General's office, MADEP, and the Executive Office of Environmental Affairs for the Commonwealth; the Attorney General's office and CTDEP for Connecticut; the City, PEDA and GE. The United States provided a 120-day public comment period from October 26, 1999, to February 23, 2000, to receive comments regarding the proposed Decree.

D. The Terms Of The Settlement

The proposed Consent Decree provides for comprehensive and expeditious environmental remediation, large-scale recovery of government costs, and substantial natural resource restoration and damages compensation. As described above, the Site includes hundreds of acres where GE's contaminants are located and are presenting risks to the public and the environment. Pursuant to the Decree, GE must comprehensively address those Site risks by implementing twenty-eight separate cleanup actions. Those cleanup actions include the Removal

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[10] The Consent Decree accompanied complaints filed on October 7, 1999 by the Plaintiffs.

Actions Outside the River, which prescribe cleanup activities for the GE Plant Area, the Former Oxbow Areas, Silver Lake, Allendale School, residential and non-residential properties in the River floodplain, and groundwater.[11] Decree, Section VII, and Appendix E.

Additionally, under the Decree GE must perform, or pay substantial costs relating to, cleanup of the River in three segments. GE is currently implementing the Upper ½ Mile Reach Removal Action. Decree ¶ ¶16, 20, and Appendix F; Exhibit 3.2, Tagliaferro Declaration at ¶ 4. Meanwhile, EPA has conducted the EE/CA for the second segment, the 1 ½ Mile Reach, immediately downstream of the Upper ½ Mile Reach. Exhibit 3.3, Janowski Declaration at ¶ 9. After entry of the Decree, GE will reimburse EPA for the costs of the EE/CA. Following EPA's consideration of public comments on the final draft EE/CA and selection of a removal action, EPA will then implement the 1 ½ Mile Reach Removal Action, with costs paid both by GE and EPA under a cost-sharing mechanism in the Decree. Decree ¶¶ 21, 103-111.

GE is also required to investigate and remediate the third River segment, called the "Rest of River", pursuant to the Decree. Decree ¶ 22. The Rest of River includes the sediments and bank soils downstream from the confluence of the East and West Branches to the extent they are areas where contaminants from the GE Plant Area have migrated and are being investigated and/or remediated under the Decree. Decree ¶ 4 at 33. Prior to EPA's final remedial action decision, GE's obligations for the Rest of River are governed by the Decree and the Reissued RCRA Permit. Decree, Revised Appendix G. The Decree requires GE to complete, pursuant to

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[11] Paragraph 16 of the Consent Decree requires GE to perform certain work prior to entry. As noted in Section II.B., GE has completed the Allendale Removal Action, is performing the Upper ½ Mile Reach Removal Action and has submitted several Work Plans.

the Reissued RCRA Permit, an investigation of the nature and extent of contamination in the Rest of River (a "RCRA Facility Investigation"). Decree ¶ 22.a and Revised Appendix G. Meanwhile, EPA is currently gathering information related to the ecological and human health risks posed by PCBs in the Rest of River, and is also conducting modeling on the fate, transport, and bioaccumulation of PCBs in the Rest of River. Decree ¶ 22.b and g, Exhibit 3.1, Olson Declaration at ¶ 15. Pursuant to the Decree, EPA's assessment of ecological risks and human health risks, and its modeling activities, will be subject to peer review by independent experts.[12] Decree ¶ 22.c, d, and h, Appendix J. Following completion of the peer review processes, and GE's RCRA Facility Investigation, GE must complete an evaluation of the alternative corrective measures to address risks posed by Rest of River contamination (a "Corrective Measures Study"). Decree ¶ 22.j and Revised Appendix G. Upon conclusion of the Corrective Measures Study, EPA will propose, through a draft modification to the RCRA Permit, a remedial action for the Rest of River that will meet the applicable requirements of both RCRA and CERCLA. Decree ¶ 22.n and Revised Appendix G.

The public and GE may comment on EPA's proposed remedial action, Decree, ¶ 22.n, and may appeal EPA's remedial action decision, both at the EPA Environmental Appeals Board, and at the United States Court of Appeals for the First Circuit.[13] Following all appeals and remands, GE must perform the final Rest of River Remedial Action as a CERCLA remedial

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[12] Peer review is a documented critical review, by qualified independent individuals, of a specific scientific and/or technical work product. There are opportunities for public participation in and review of documents related to the peer review process. The protocol for the peer reviews are set out in Appendix J to the Decree.

[13] By agreement in the Decree, GE's appeal rights are limited. Decree, ¶ 22.q-v.

action. Decree, ¶ 22.z.

In addition to performance of the work, the Decree also requires GE to reimburse the United States for up to $70 million of past and future government costs related to the Site. To resolve claims for natural resource damages, GE must implement the response actions selected by EPA after EPA has conferred with and considered the input and recommendations of the state and federal trustees. The response actions will constitute primary restoration of affected natural resources. The Decree also requires GE to make a payment to the federal and state natural resource trustees of $15.735 million in damages to compensate for injury to natural resources,[14] and requires GE to implement restoration and enhancement activities in connection with the response actions.[15] The natural resource trustees also may receive under the Decree up to $4 million in cash or in kind services from PEDA.[16] Finally, there are also some additional natural

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[14] The $15.735 million from GE will be allocated as follows: (1) $15 million to be deposited into an interest bearing account held by the U.S. Department of the Interior, on behalf of all of the federal and state natural resource trustees, for the implementation of projects to restore, replace, or acquire the equivalent of injured natural resources; (2) $600,000 as mitigation for wetlands impacts; (3) $60,000 as mitigation for additional habitat impacts associated with PCB contamination and removal actions at the Site; and (4) $75,000 for aquatic habitat and fish restoration in Silver Lake. Decree ¶ 114.

[15] The projects to be performed by GE include riparian and habitat improvements in key segments of the River. GE will maintain the projects, including replacement of failing species, for 7 years, with elimination of nuisance vegetation in the areas restored for at least 5 years. In addition, the areas where the projects will be carried out will be subject to conservation easements in perpetuity and/or strict land use restrictions, thereby preventing development or any other activity which would impair the habitat and riparian uses and natural resource services that will be restored to these areas. Decree ¶ 118. The estimated restoration value of these projects is at least $ 6 million.

[16] The $4 million from PEDA will be satisfied through cash payments and/or in-kind services, such as provision of space within existing buildings for a nature or interpretive center. PEDA will not be obligated to pay on the $4 million obligation until cash flows from redevelopment

resource protection and restoration activities incorporated into the Settlement. Decree ¶ 123. The estimated value of the work and payments under the Decree is $300-700 million.[17] Exhibit 3.1, Olson Declaration at ¶ 7.

Under the Decree, GE receives from the governments covenants not to sue for particular Site-related claims. Decree, Section XXVI. The covenants take effect over time as money is paid and response actions are performed. In addition, through the settlement, GE obtains protection from contribution claims for matters addressed in the settlement. Decree ¶ 191.

E. Definitive Economic Development Agreement

At the same time that the parties were negotiating the Consent Decree, the City, PEDA and GE were negotiating redevelopment issues. In July 1999, the City, GE and PEDA entered into a Definitive Economic Development Agreement (the "Agreement") with respect to the redevelopment of portions of the GE facility property in Pittsfield. Exhibit 6. The Agreement is contingent upon entry of the Decree but is an independent deal not subject to review by this Court. The Agreement provides for GE, *inter alia,* to: perform demolition of certain structures; supply up to 350,000 square feet of existing building foundations or appropriate sites for new foundations; pay for refurbishing, if PEDA so dictates, of a particular structure; pay the City $1,000,000 per year for 10 years in recognition of the lost tax revenue to the City; pay the City $100,000 for an economic reuse analysis; pay PEDA $70,000 to support operating expenses; make available $15,300,000 to PEDA for economic redevelopment on properties; and transfer

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efforts are sufficient to cover this obligation. Decree ¶ 124.

[17] The wide range is due to the potential range of costs for the Rest of the River.

certain properties to PEDA. Exhibit 6.

F. Massachusetts Administrative Consent Order

In connection with the Consent Decree negotiations, Massachusetts and GE also negotiated a revised administrative consent order addressing off-Site properties on which fill material was placed ("Revised ACO"). The Revised ACO is to supersede the 1990 ACOs, and is to be executed within 15 days of entry of the proposed Consent Decree. Decree ¶ 11, and Appendix H. The work to be performed under the ACO is not governed by the Consent Decree.

G. Status Of This Action

On February 22, 2000, the Housatonic River Initiative ("HRI") filed pro se a Motion to Intervene in this action and on March 2, 2000, filed an Amended Complaint to accompany its motion to intervene. By letter of April 11, 2000, HRI withdrew its motion to intervene in this action. On February 22, 2000, Moldmaster Engineering, Vincent Curro, and Vincent and Cheryl Stracuzzi (hereinafter "Moldmaster") filed a Motion to Intervene in this action. On March 24, 2000, Caroline Church, Dorothy Cohen, Thomas and Frances Ferguson, Abby Kramer Mayou, Gerald and Patricia Reder, Gwendolyn Sears, Tim and Nancy Smith, and the Mildred L. Zimmerman Trust (hereinafter "Church") filed a Motion to Intervene in this action.

On April 11, 2000, the United States, the Commonwealth of Massachusetts, and GE each filed, and the City and PEDA jointly filed, a response to the HRI, Moldmaster, and Church Motions to Intervene. With respect to the HRI and Moldmaster Motions, the United States, Massachusetts, GE, the City, and PEDA all opposed such motions.[18] With respect to the Church

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[18] As noted above, HRI withdrew its Motion to Intervene on the same day as the other parties' responses were filed.

motion, the United States, Massachusetts, GE, the City and PEDA did not oppose such motion contingent upon entry of a proposed Case Management Order ("CMO") assented to by the United States, Massachusetts, Connecticut, GE, the City, PEDA, and Church.

In April 2000, in response to public comments, EPA announced its commitment to undertake additional measures to enhance community involvement at the Site. Exhibit 7. Such assurances, which do not require changes to the Consent Decree, include enhancements in evaluation of innovative treatment technologies for the Site, public education and monitoring, property owner protections, and other areas of citizens' concern. Id.

On May 19, 2000, the Housatonic Environmental Action League, Inc. ("HEAL"), and Gail Harrison, Allen Russell, and other individual alleged members of the Schaghticoke Indian Tribe (the "Harrison-Russell" group) moved jointly for intervention in the Consent Decree. The United States, GE, the City and PEDA opposed such motion.

On June 13, 2000, this Court held a hearing on the motions to intervene and the United States' Motion for a Case Management Order. On June 13, 2000, Moldmaster filed a Reply Memorandum of Law In Support Of Motion To Intervene And In Opposition To The United States Proposed Case Management Order. On June 16, 2000, Moldmaster lodged a First Amended Complaint. On June 20, 2000, HEAL/Harrison-Russell lodged an Amended Complaint. On June 23, 2000, the United States filed its further Memorandum In Opposition To Amended Complaint By HEAL/Harrison Russell. As of this date, the Court has not ruled on the pending motions.

III. STATUTORY SCHEME

Congress enacted CERCLA in 1980 in response to widespread concern over the environmental and public health effects created by improper disposal of hazardous substances. See Eagle-Picher Indus. v. EPA, 759 F.2d 922, 925 (D.C. Cir. 1985). By enacting CERCLA, Congress directed the President to administer a federal program to secure "prompt and effective response to problems of national magnitude resulting from hazardous waste disposal." United States v. Cannons Eng'g Corp., 899 F.2d 79, 90 (1st Cir. 1990) (quoting United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)). As amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), CERCLA provides the federal government and the states with broad authority to investigate and clean up hazardous waste sites, Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), to compel potentially responsible parties ("PRPs") to clean up such sites, Section 106 of CERCLA, 42 U.S.C. § 9606, and to obtain reimbursement from PRPs of costs incurred by the government, Section 107 of CERCLA, 42 U.S.C. § 9607.

The parties responsible for reimbursing the government's costs and implementing the cleanups selected for Superfund sites include the past and present owners of the site and the generators and transporters of the hazardous substances disposed of at the site. See O'Neil v. Picillo, 883 F.2d 176, 178-179 (1st Cir. 1989), cert. denied, sub nom. American Cyanamid Co. v. O'Neil, 493 U.S. 1071 (1990); New York v. Shore Realty Corp., 759 F.2d 1032, 1043 (2d Cir. 1985); United States v. Monsanto, 858 F.2d 160, 167-171 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). CERCLA creates strict, joint and several liability for responsible parties. O'Neil v. Picillo, 682 F. Supp. 706, 708 (D.R.I. 1988), aff'd.,883 F.2d at 178-179; United States v. Kayser-

Roth Corp., 724 F. Supp. 15, 19 (D.R.I. 1989), aff'd., 910 F.2d 24 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); United States v. Davis, 882 F. Supp. 1217, 1219 (D.R.I. 1995).

Section 7003 of RCRA, like CERCLA, was originally enacted in 1976 as part of Congress' attempt to regulate the treatment, storage and disposal of hazardous wastes in this country. 42 U.S.C. § 6973(a). Section 7003 gives EPA broad authority to respond to potential environmental hazards. In particular, Section 7003 imposes liability on persons who "contributed" or presently are contributing to the disposal of solid or hazardous waste, 42 U.S.C. § 6973, and authorizes suit upon receipt of evidence of "an imminent and substantial endangerment to health or the environment", 42 U.S.C. § 6973(a).[19] United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989). Section 7003, like Section 107 of CERCLA, imposes strict liability. United States v. Aceto Agric. Chem. Corp., 872 F.2d at 1377 (8th Cir. 1989), citing United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 737-42 (8th Cir. 1986), cert. denied, 108 S.Ct. 146 (1987) and other cases. Like CERCLA, RCRA is a

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[19] Section 7003(a) provides in full as follows:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may represent an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both...

42 U.S.C. § 6973.

remedial statute, which should be liberally construed. United States v. Aceto Agric. Chem. Corp., 872 F.2d at 1373; accord United States v. Valentine, 885 F. Supp. 1506, 1511 (D. Wyo. 1995).

Congress enacted the Clean Water Act ("CWA" or the "Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. See also, H.R. Rep. No. 92-911 at 76 - 77 (1972). In order to achieve these goals, Congress prohibited altogether the discharge of pollutants into the waters of the United States, except in compliance with specific provisions of the Act. 33 U.S.C. § 1311(a). Foremost among those provisions is Section 402, which established the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342. Under the NPDES program, the Administrator of EPA is authorized to issue permits for the discharge of pollutants in accordance with specified limitations and conditions. Section 402(a), 33 U.S.C. § 1342(a). Discharges must comply with the terms of the applicable NPDES permit. EPA may delegate the authority to issue permits to the states. Even in states with an authorized program under the CWA, such as Connecticut, EPA is authorized to ensure compliance. As with CERCLA, liability under the CWA is strict. Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200, 1208 (4th Cir. 1986) ("Liability under the Clean Water Act is a form of strict liability.") (citing United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1978).

CERCLA, RCRA and Department of Justice regulation provide a specific mechanism for the public to review proposed environmental settlements and make their views known. That is the public comment period provided in 42 U.S.C. § 9622, 42 U.S.C. § 6973, and 28 C.F.R. § 50.7. Pursuant to these provisions, the United States solicits comments, compiles them and

considers them to determine whether to go forward with a settlement or to withdraw from it. If the United States decides to proceed with a settlement it submits the comments to the court for consideration in connection with a motion for entry. Courts have upheld the sufficiency of the comment process to protect the interests of the public. United States v. Pitney Bowes, Inc., 25 F.3d 66, 73 (2d Cir. 1994); City of Bloomington v. Westinghouse Elec. Corp., 824 F.2d 531, 537 (7th Cir. 1987); United States v. W.R. Grace & Company-Conn., 185 F.R.D. 184, 192 (D.N.J. 1999); United States v. ABC Ind., 153 F.R.D. 603, 608 (W.D. Mich. 1993); United States v. Mid-State Disposal, Inc., 131 F.R.D. 573, 577 (W.D.Wis. 1990); United States v. Bliss, 132 F.R.D. 58, 60-61 (E.D. Mo. 1990).

IV. ARGUMENT

THE COURT SHOULD ENTER THE PROPOSED CONSENT DECREE AS A FINAL JUDGMENT BECAUSE IT IS FAIR, REASONABLE, CONSISTENT WITH THE PURPOSES OF CERCLA, RCRA AND THE CWA, AND IN THE PUBLIC INTEREST; THE COMMENTS SUBMITTED ON THE DECREE PROVIDE NO BASIS TO DENY ENTRY OF THE DECREE

A. THE COURT SHOULD ENTER THE CONSENT DECREE BECAUSE THE SETTLEMENT IS FAIR, REASONABLE, CONSISTENT WITH THE PURPOSES OF CERCLA, RCRA AND THE CWA, AND IN THE PUBLIC INTEREST

1. Public Policy Favors Environmental Settlements

There is a "clear policy in favor of encouraging settlements . . . particularly in an area where voluntary compliance by the parties . . . will contribute significantly toward ultimate achievement of statutory goals." Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 771 (2d Cir. 1975), cert denied, sub nom. Larkin v. Patterson, 427 U.S. 911 (1976); City of New York v. Exxon Corp., 697 F. Supp. 677, 692 (S.D.N.Y. 1988); United States v. County of

Muskegon, 33 F.Supp.2d 614, 620 (W.D. Mich. 1998)(CWA case in which court noted that as a general matter "voluntary settlement of legal disputes is favored").

The public policy favoring the resolution of litigation by settlement is particularly strong in environmental cases. In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1029 (D. Mass. 1989)(The "Congressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation"). The policy of the CERCLA is to encourage settlements, especially where the government "has pulled the laboring oar in constructing the proposed settlement." United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990). This strong public policy extends beyond CERCLA to other "complex and technical regulatory contexts." United States v. Puerto Rico Electric Power Authority, 204 F.3d 275, 280 (1st Cir. 2000)(settlement of United States' complaint brought pursuant to Clean Air Act, Clean Water Act, Emergency Planning and Community Right-to-Know Act, CERCLA and RCRA). Thus, the policy favoring settlement "is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of [EPA]." United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1035 (D. Mass. 1989), aff'd 899 F.2d 79 (1st Cir. 1990). See also United States v. Vertac Chem. Corp., 756 F. Supp. 1215, 1218 (E.D. Ark. 1991), aff'd, sub. nom. United States v. Hercules, Inc., 961 F.2d 796 (8th Cir. 1992) (court entered CERCLA/RCRA settlement quoting Cannons) Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1082 (1st Cir. 1986)("early resolution of [CERCLA] disputes is a desirable objective"); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983), cert. denied, sub nom, Union Carbide v. NRDC, Inc., 476 U.S. 1219 (1984) (CWA settlement saves time and money so is in high judicial favor); United States

v. Bliss, 133 F.R.D. 559, 567 (E.D. Mo. 1990) (court recognized public policy favoring settlements in entering settlement under RCRA and CERCLA). Settlement of environmental cases is highly favored because it effectuates basic policy goals of the statutes.

The proposed Consent Decree furthers the goals of CERCLA, RCRA and the CWA because the comprehensive and expeditious cleanup of the Site, virtually all being performed or paid for by GE, the substantial cost reimbursement by GE, and the natural resource compensation all promote the legislative objective of facilitating prompt settlement and cleanup of contaminated sites.

2. Standard For Judicial Review Of The Consent Decree

Approval of a consent decree is a judicial act committed to the informed discretion of the trial court. United States v. Cannons Eng'g Corp., 720 F. Supp. at 1035; United States v. Hooker Chem. & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985). Generally, when reviewing a settlement the standard to be applied is whether the settlement is "fair, adequate, and reasonable." Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 965 (3rd Cir. 1983). See also, Conservation Law Found. of New England, Inc. v. Franklin, 989 F.2d 54, 58 (court reviews decree to ensure that it is "fair, adequate, reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; [and] that it is consistent with the objectives of Congress")(quoting Durrett v. Housing Authority of City of Providence, 896 F.2d 600, 604 (1st Cir. 1990)).

This standard has been affirmed for the review of CERCLA settlements. United States v. Cannons Eng'g Corp., 899 F.2d at 85 (the court should enter a CERCLA consent decree if the decree "is reasonable, fair, and consistent with the purposes that CERCLA is intended to

serve.")(quoting the House Report on the Superfund Amendments and Reauthorization Act of 1986, H.R. Rep. No. 99-253, Part 3 at 19 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3042); United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1085 (1st Cir. 1994); United States v. DiBiase, 45 F.3d 541, 543 (1st Cir. 1995).

This standard has also been affirmed for settlements pursuant to other federal environmental laws. Under the CWA, the court "need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts." Citizens for a Better Env't v. Gorsuch, 718 F.2d at 1126. See also United States v. PREPA, 204 F.3d at 279 (court must determine if the setlement is "fair, adequate, reasonable and consistent with the objectives of Congress"); United States v. District of Columbia, 933 F.Supp. 42, 48 (D.D.C. 1996)(court will review a CWA settlement to ensure it is fair, reasonable and consistent with public policy). The standard for RCRA is the same. United States v. PREPA, 204 F.3d at 279; United States v. Bliss, 133 F.R.D. at 568 (in context of a RCRA/CERCLA settlement, "[t]his Court adopts the First Circuit's well-reasoned rubric for entry of a CERCLA consent decree ... ."); United States v. Browning-Ferris Indus. Chem. Serv., Inc., 704 F. Supp. 1355 (M.D. La. 1988) ("In determining whether to approve the consent decree [in a multimedia action under RCRA, the Clean Air Act, CWA, CERCLA and state law], the court must find that the settlement is fair, adequate and reasonable.")

Judicial review of a settlement negotiated by the United States is subject to special deference; the court should not engage in "second-guessing the Executive Branch." United States v. Cannons Eng'g Corp., 899 F.2d at 84. See generally Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961)(absent malfeasance or bad faith, courts are not to "assess the

wisdom of the Government's judgment in negotiating and accepting ... [a] consent decree"); Conservation Law Found. v. Franklin, 989 F.2d at 58 ("district court must exercise some deference to the agency's determination that settlement is appropriate") (quoting Federal Trade Comm'n v. Standard Fin. Management Corp., 830 F.2d 404, 408 (1st Cir. 1987)). As the First Circuit dictates, "[t]he relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal. . . ." United States v. Cannons Eng'g Corp., 899 F.2d at 84. "If a settlement were required to meet some judicially imposed platonic ideal, then, of course, the settlement would constitute not a compromise by the parties but judicial fiat. Respect for litigants, especially the United States, requires the court to play a much more constrained role." United States v. Rohm & Haas Co., 721 F. Supp. 666, 685 (D.N.J. 1989). See also, United States v. Charles George, 34 F.2d at 1085 (Court "must defer heavily to the parties' agreement and the EPA's expertise."). Furthermore, the reviewing court may approve or reject the proposed Consent Decree, but the court does not have the authority to modify the proposed Decree. United States v. Cannons Eng'g Corp., 720 F.Supp. at 1036.

Accordingly, the Court's role in this process is limited and the Court should not substitute its judgment for that of the parties. Since the proposed settlement is fair, reasonable, consistent with the goals of CERCLA, RCRA and the CWA, and in the public interest this Court should enter the Consent Decree.

3. The Settlement is Procedurally Fair

The first requirement the Court must evaluate is the fairness of the proposed Consent Decree. Fairness is comprised of two components: procedural fairness and substantive fairness.

United States v. Cannons Eng'g Corp., 899 F.2d at 86.[20]

The Consent Decree fully satisfies the first prong of the First Circuit's fairness test, procedural fairness. "To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." Id. In the present action, the parties negotiated intensively, with the assistance of third party neutrals, for nearly two years, and reached a fair compromise that calls for expeditious and comprehensive cleanup, reimbursement of past and future government costs, recovery of natural resource damages, and resolution of particular liability claims against GE.

During the entire negotiating process, the governments, PEDA, the City and GE were represented by sophisticated counsel. All negotiations were conducted at arms-length, with adversarial vigor, and in good faith. In United States v. Rohm & Haas Co., the court found that:

> where a settlement is the product of informed, arms-length bargaining by the EPA, an agency with the technical expertise and the statutory mandate to enforce the nation's environmental protection laws, in conjunction with the Department of Justice . . . a presumption of validity attaches to that agreement.

721 F.Supp at 681 (emphasis added)(citing City of New York v. Exxon, 697 F.Supp. 677, 692 (S.D.N.Y. 1988)). In fact, no comment seriously has raised the issue of the candor, bargaining balance or vigor of the negotiations among the parties at the negotiating table.

Further, the governments took steps to ensure the negotiation process was procedurally

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[20] While not directly identifying the components as procedural and substantive fairness, cases under the CWA and RCRA use the same general framework to describe fairness. "A review of the fairness of a proposed consent decree requires an assessment of the good faith of the parties, the opinions of the counsel, and the possible risks involved in litigation if the settlement is not approved." United States v. District of Columbia, 933 F. supp. at 48 (CWA case). See also, United States v. Hooker Chem. & Plastics Corp., 607 F. Supp. at 1057 (same general standard for RCRA case).

fair to persons not at the table. The government plaintiffs, prior to and during the negotiations, worked extensively to solicit from the public its views on potential settlement and cleanup-related topics. EPA and MADEP held numerous public meetings to gauge public concerns on cleanup,[21] including setting aside a full day in July 1998, well prior to the parties reaching the October 1998 tentative agreement, to receive public comments and concerns. The governments incorporated that public input into their settlement strategy, which is the basis for the proposed Decree. In addition, nearly one year prior to lodging the Consent Decree, EPA and MADEP established a Citizens Coordinating Council ("CCC"), made up of over 30 environmental, business and community leaders from Berkshire County and Connecticut. The CCC, which meets monthly, provides a participatory forum for the governments to discuss with the public the status of cleanup, natural resource restoration, and other activities at the Site, and to obtain feedback, and answer questions. During the period prior to lodging the proposed Decree, some CCC discussion was constrained by the confidentiality required by the ongoing mediated negotiations; however, even during that time period the governments were able to obtain CCC input on important cleanup topics such as GE's proposed Work Plan for remediation of the Upper ½ Mile Reach of the Housatonic River, GE's proposed Work Plan for the Allendale School Removal Action, and the use of On Plant Consolidation Areas for consolidation of contaminated sediments and soils. Exhibit 3.1, Olson Declaration at ¶ 14.

With respect to NRD, public input was carefully solicited during the development of the governments' NRD settlement position. See Exhibit 2, Response 76. For example,

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[21] A more detailed, but by no means exhaustive, list of the governments' efforts to solicit and incorporate public input concerning the Site into their activities is set out in Exhibit 8 hereto.

representatives of the Trustees consulted with various persons and entities in Massachusetts and Connecticut to obtain input relating to compensatory restoration options. A consultant for the Trustees also convened focus groups to fine tune settlement options. See Exhibit 9. This information was used to evaluate the nature and extent of natural resource damages and thereafter develop the settlement positions of the Trustees for the negotiations. After the tentative agreement was reached, the Trustees held meetings in the Fall of 1998 to explain the proposed agreements as to natural resource damages. See Exhibit 10 (materials distributed at meeting in October 1998) and Exhibit 8.

In short, this extensive public input into cleanup decisions, NRD evaluation and natural resource restoration planning has been a hallmark of this Site. It will continue to be so. The CCC meetings continue monthly, affording an institutional framework for soliciting public feedback on proposed plans for the many cleanups and natural resource restoration projects that will proceed if the proposed Decree is entered. EPA also has recently pledged, in part in response to public comments on the proposed Decree, to take additional steps designed to enhance public education and monitoring of Site cleanups.[22] Included among EPA's commitments to community involvement are consulting with interested parties on ways to expand and improve the public's access, via the EPA website, to important sampling and other data regarding the ongoing cleanups; working with interested parties to make the CCC process

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[22] A good example of EPA putting this into practice is the "open house" being conducted today, July 20, 2000, at the Site. As part of the open house, all interested persons from the community have been invited to tour the portions of the GE facility property on which clean-up activities will take place, including the GE Plant Area, the On-Plant Consolidation Areas, and areas of potential redevelopment.

more effective; and holding periodic discussions with affected municipalities regarding the large-scale Rest of River investigation and eventual remediation decisionmaking.[23] Even more recently, the June 7, 2000 CCC meeting centered around a discussion of EPA's investigation of the Rest of River, specifically the Connecticut portion of the River, and included EPA's solicitation of interested persons from Connecticut to join the CCC and/or to meet semiannually to participate in discussions about Site project areas of interest.

In addition, the public will have significant future involvement in connection with selecting natural resource restoration projects. The Trustees intend to supplement the CCC process with enhanced public participation in their restoration planning process.[24] After entry of the Decree the Trustees plan to form a Trustee Council composed of authorized representatives (as required under CERCLA and the NCP) from Massachusetts, Connecticut, DOI and NOAA. The Trustee Council will be responsible for directing the development, final approval, and implementation of restoration plan(s) for restoration activities under the Consent Decree in Massachusetts and Connecticut, pursuant to the Trustees' authority and responsibilities under Section 107(f). The Trustee Council will ensure that there is adequate public notice and opportunity for hearing and consideration of all public comment, as required by Section 111(i) of CERCLA, 42 U.S.C. § 9611(i). See Exhibit 2, Responses 77, 79.

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[23] See Exhibit 7 for the entire set of assurances made to the public by EPA in April 2000.

[24] For a more detailed explanation of public participation in the NRD restoration process see Exhibit 2, Response Section IV. The Trustees have entered into a Letter of Understanding obligating specific amounts of recovered funds to be spent on restoration projects in the geographic regions of Connecticut and Massachusetts. The Letter of Understanding specifically requires the Trustees to follow statutory requirements for restoration planning and implementation.

The negotiations in this matter, thus, support a finding of procedural fairness - - the negotiations were conducted in good faith and at arm's length by experienced counsel. United States v. Cannons Eng'g Corp., 899 F.2d at 87.

Various commenters objected to the procedural fairness of the settlement because the negotiations were not conducted in an open forum available to the general public. Exhibit 2, Comment 4. There is no requirement under CERCLA, RCRA or the CWA for the governments to negotiate in a fish bowl. The fact that the negotiations were confidential and only among the parties does not mean the settlement is procedurally unfair. CERCLA, RCRA and government policy provide the public with an opportunity to comment upon a proposed settlement through the public comment period. 28 C.F.R. § 50.7; 38 Fed. Reg. 19029, 42 U.S.C. § 9622(d), and 42 U.S.C. § 9673(d). This is the congressionally and court approved method for the public to participate in environmental settlements. See Section III. See also Exhibit 2, Responses 2 - 5.

As a practical matter, it would have been difficult if not impossible to negotiate this matter in a public forum. Given the number, complexity and novelty of issues an expanded group of negotiators would have slowed things to a standstill and created more problems reaching agreements. "Parties would be reticent to make any concessions at a settlement conference if they could expect that their statements would be published to the public at large." United States v. Town of Moreau, 979 F. Supp. 129, 134-35 (N.D.N.Y. 1997). There also would have been the question of who had what authority to reach agreements. Finally, there would have been the issue of where to draw lines as to allowable participants.

Private parties are not required to negotiate disputes in public. There is no basis to argue the governments should be treated differently. The First Circuit has agreed. "[T]he government

is under no obligation to telegraph its settlement offers, divulge its negotiating strategy in advance, or surrender the normal prerogatives of strategic flexibility which any negotiator cherishes.. . . So long as it operates in good faith, EPA is at liberty to negotiate and settle with whomever it chooses." United States v. Cannons Eng'g Corp., 899 F.2d at 93.[25] Also see, United States v. Glens Falls Newspapers, Inc., 160 F.3d 853 (2d Cir. 1998) (court refused to permit disclosure of confidential settlement negotiations, noting that few cases would ever be settled if the press or public were in attendance at a settlement conference or privy to settlement proposals); United States v. PREPA, 204 F.3d at 277 (court rejected objections to a settlement based upon lack of participation by intervener in negotiations). In short, the government bears no obligation to invite the public into the negotiations process. Arizona v. Nucor Corp., 825 F. Supp. 1452, 1458 (D.Ariz. 1992) (private negotiations are appropriate provided they are conducted in good faith).[26]

Here there is little question that the negotiations were in good faith. All participants in the negotiation were represented by sophisticated counsel and the negotiations were conducted under the auspices of two third party neutral mediators. Moreover, representatives of the City of Pittsfield were included in the negotiations, contributing a more local level of representation to

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[25] Although the Cannons Court was considering the rights of other potentially liable parties to participate in settlement discussions, the principle of the governments' right to conduct private negotiations holds equal force whether liable or non-liable parties seek to join.

[26] Moreover, the settlement negotiations were governed by a mediation agreement, signed by all the parties, pursuant to which the negotiations were to be maintained in confidence unless all parties consent to disclosure. Because the negotiations were conducted in the presence of a mediator, the negotiations are also afforded protection from disclosure under Massachusetts law. See M.G.L. c. 233 §23C, read in conjunction with M.G.L. c.4 §7 cl.26 and M.G.L. c. 66 §10(a).

the negotiations. In sum, there is no room to question the governments' good faith, the adequacy of representation, or the propriety of the confidentiality of the negotiations. The procedural process leading up to and since the lodging of the proposed Decree has been more than fair to all concerned parties in the settlement as well as interested parties outside the settlement. The Consent Decree should be entered.

4. The Settlement Is Substantively Fair

The second element of the fairness inquiry is substantive fairness. As the First Circuit stated in Cannons: "[s]ubstantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." 899 F.2d at 87. As the Court continued, "[t]he logic behind these concepts dictates that settlement terms must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each [potentially responsible party] has done." Id. at 87. See also, United States v. Charles George, 34 F.3d at 1087-88.

In the proposed settlement, GE will bear several hundred million dollars in costs and cleanup obligations to account for its responsibility for PCB contamination at the Site.[27] The components of the settlement demonstrate substantive fairness: GE's obligation to complete a comprehensive and expeditious cleanup of the Site; GE's commitment to compensate the governments for natural resource damages; GE's requirement to reimburse a significant amount

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[27] EPA has estimated of the value of the settlement as approximately $ 300-700 million, depending in large part on the cost of the Rest of River cleanup. Exhibit 3.1, Olson Declaration at ¶ 7.

of the governments' past and future costs; the governments' relatively minimal degree of compromise in the settlement; the significant limitations and reservations regarding the governments' covenants not to sue GE; and the appropriate boundaries around GE's contribution protection in the settlement.

a. Comprehensive and Expeditious Cleanup

Pursuant to this Decree, GE must undertake a comprehensive cleanup program to address risks posed by contaminants at the Site. GE must perform at its own expense twenty-five separate Removal Actions Outside the River, must perform at its own expense the Upper ½ Mile Reach and Rest of River response actions, and must pay a substantial share of costs toward EPA's performance of the 1 ½ Mile Reach Removal Action. Thus the settlement ensures that the entire Site will be addressed. Moreover, under the Decree, GE was required to begin significant components of the Site cleanup immediately. Decree ¶ 16. This immense set of cleanup obligations at the Site forces GE to bear responsibility for the threats posed by its past disposal of PCBs. The Decree is substantively fair. See Section IV. A.5.a for further detail on the cleanups.

b. Natural Resource Damage Recovery

Another illustration of the substantive fairness of the governments' settlement with GE is the set of requirements regarding compensation for natural resource damages resulting from GE's PCB releases. Under the terms of the proposed Consent Decree, the settlement of claims for NRD consists of the following: (1) performance of the response actions required under the proposed Consent Decree and considered as "primary restoration;" (2) a single cash payment of $15.735 million from GE; (3) the performance of natural resource restoration, protection, or enhancement projects by GE with an estimated restoration value of approximately $6 million;

and $4 million in cash and/or in kind services from PEDA. Decree ¶ 112. These elements of the NRD settlement are in addition to cost recovery of expenses for assessment of natural resource damages.[28] If finalized, the settlement will represent one of the largest and most extensive NRD settlements in New England.[29]

c. Large-Scale Recovery of Government Costs from GE

The governments have also obtained from GE commitments to reimburse, on a very large scale, past and future government costs relating to the Site. Section XX of the Decree, Reimbursement of Costs, contains specific requirements for GE's payment of government costs. This provision ensures GE payment of the lion's share of government costs in Site-related activities such as overseeing GE's cleanup performance, performing government investigations or sampling, enforcing the provisions of the Decree against GE, and ensuring public participation in the cleanup process. Within thirty days of entry, GE must pay $13.4 million plus interest to a special account in the Superfund to reimburse the United States for Past Response Costs. GE also must pay $1.2 million plus interest to the federal natural resource trustees for their past costs. Overall the United States estimates that it may recover in excess of $70 million from GE in the various cost categories under the Decree,[30] exclusive of the 1 ½ Mile Reach Removal

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[28] The Trustees will recover approximately $1.2 million in expenses related to natural resource damage assessment. Decree ¶ 94.

[29] Comments concerning the adequacy of the recovery for natural resource damages are addressed in the discussion of the reasonableness of the settlement in Section IV. A.5.

[30] The United States' estimated recovery is, of course, approximate, being based in large part on anticipated activities and costs. That being said, the estimate is as follows: recovery of $13,459,738 to EPA and recovery of approximately $1.2 million to the natural resource trustees in Past Response Costs, Consent Decree ¶ 94; recovery of all U.S. Future Response Costs under

Action costs.[31]

Based on the foregoing, clearly the Decree provides substantial value to the governments --- through the comprehensive cleanup, the natural resource damages recovery, and the recovery of costs incurred and to be incurred. The value of the Decree, if entered, is estimated by the United States as approximately $300 Million to $700 Million. [32] Exhibit 3.1, Olson Declaration ¶¶ 7, 8. GE is bearing a very substantial cost of the harm for which it is legally responsible. While the United States made no compromises as to cleanup, the United States compromised certain costs in achieving this settlement. Even when viewing the possible monetary shortfalls

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the Decree, which EPA estimates may be approximately $5 Million, Consent Decree ¶ 95; recovery of up to $14.5 Million in U.S. Future Rest of River Capped Response Costs, Consent Decree ¶ 96; recovery of up to $400,000 in U.S. Future Additional Sampling Costs, Consent Decree ¶ 97; recovery of up to $11 Million in U.S. Oversight Costs, Consent Decree ¶ 98.a; recovery of up to $25 Million in U.S. Rest of River Oversight Costs, Consent Decree ¶ 98.b; and recovery of up to $250,000 per year in U.S. Post-Removal/Groundwater Monitoring Costs beginning after completion of the Removal Actions Outside the River and the Upper ½ Mile Reach Removal Action, with an estimated recovery of $2.5 Million, Consent Decree ¶ 99. Exhibit 3.1, Olson Declaration ¶ 9.

[31] EPA estimates that the 1 ½ Mile Reach Removal Action will cost approximately $50 million. Exhibit 3.1, Olson Declaration ¶ 7. Based on that estimate GE will pay $35 million of such costs. Decree ¶ 103.

[32] EPA's estimates include the following: Allendale School - $7 million; remainder of the Removal Actions Outside the River (Silver Lake, GE facility, Former Oxbows, groundwater, Unkamet Brook and Floodplain properties) - $100 million; Upper ½ Mile Reach and Source Control - $15 million; 1 ½ Mile Reach - $50 million; and Rest of River - $100-500 million; EPA cost recovery - up to $71.9 million; Natural resource damage payments and activities - $25 million. Exhibit 3.1, Olson Declaration ¶ 7. Even though these settlement value estimates are necessarily approximate the United States may rely on them. As the First Circuit has noted, if the figures relied upon in making cost estimates for settlement "derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise". United States v. Cannons Eng'g Corp., 899 F.2d at 90. There is a plausible basis for the governments' numbers here.

liberally, and the value of the Decree obligations most conservatively, the United States still recovers over 90 percent of Site costs; conversely, if the value of the Decree obligations is viewed less conservatively, the percentage recovery approaches 97 percent. Exhibit 3.1, Olson Declaration ¶ 10. This limited compromise is justified by the risks and uncertainties of litigation and the benefit of achieving a prompt settlement.

The immediate cleanup obligations on GE under this settlement enhance its value further. As noted above, the United States was able to require GE to begin cleanup of two significant areas, Allendale School and the Upper ½ Mile Reach, prior to GE having the assurance that the Decree would be supported by the governments and the Court following public comments. In addition, GE has and continues to implement significant source control activities. Decree, ¶ 16. That 'jump start' removal of substantial amounts of PCB contaminated soil and sediment, and the recovery of substantial amounts of NAPL from areas within and adjacent to the Upper ½ Mile Reach, has a very substantial, albeit hard-to-quantify, value to the United States and the public.

Finally, the prospect for economic redevelopment on the heels of the EPA-driven cleanups is a significant factor in favor of the settlement. The Agreement among the City, GE and PEDA is dependent on entry of the Decree. Exhibit 6. While CERCLA's primary focus is on cleanup, cost recovery and natural resource restoration, the United States has established policy objectives and substantial resources devoted to promoting redevelopment at previously contaminated sites.[33] The settlement includes tens of millions of dollars of commitments by GE

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[33] EPA has a Brownfields Economic Redevelopment Initiative designed to empower states, communities, and other stakeholders in economic redevelopment to work together in a timely

that will facilitate economic growth and redevelopment for Pittsfield and the surrounding environs.[34]

The overall settlement places heavy burdens on GE commensurate with GE's responsibility for the threats posed and damage caused by its contamination. The minimal compromises discussed herein do not alter that accountability – GE is bearing the cost of the harm for which it is legally responsible.

d. Limitations On Governments' Covenants Not To Sue GE

In exchange for GE's massive commitment of resources to fulfill the Decree's mandates, GE receives specific covenants not to sue from the governments. Decree § XXVI, Covenants Not To Sue By Plaintiffs. These covenants not to sue are a just consideration to GE because of the extensive obligations being undertaken by GE, and the additional cleanup safeguards in the Decree.

As CERCLA recognizes, a party that settles with the government for specific cleanup commitments may receive covenants not to sue. 42 U.S.C. § 9622(f). Thus, granting GE a covenant not to sue is itself consistent with substantive fairness.

The covenants not to sue are themselves limited. Initially, the scope of the covenants have significant limitations designed to protect the government from heretofore unknown PCB

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manner to prevent, assess, safely clean up, and sustainably reuse brownfields, which are sites that have actual or perceived contamination and active potential for redevelopment or reuse. See generally EPA's Internet web site at www.epa.gov/swerosps.bf.

[34] In fact, the redevelopment component of the settlement has already spawned one potentially major success story. In October 1999, a $1.3 million federal transportation grant was announced which paves the way for a group to build electric-powered vehicles on the former GE facility.

threats. Decree ¶¶ 161, 166, 170. Also, the Decree explicitly reserves a number of potential actions, including inter alia: claims based on a failure by GE to meet a requirement of the Decree; criminal liability; liability for violations of federal or state law which occur during or after implementation of any response action under the Decree; natural resource damages arising from catastrophic failure of Woods Pond Dam or Rising Pond Dam; or natural resource damages from a material breach of Woods Pond Dam due to negligent operation or maintenance. Decree ¶¶ 175, 176. Moreover, as stated in the Decree, "[t]hese covenants not to sue are conditioned upon the satisfactory performance by [GE] of its obligations under this Consent Decree . . .." Decree ¶¶ 161.e, 166.f, 170.e. Furthermore, consistent with Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3), the future liability covenants provided to GE by the governments do not take effect as to specific cleanups until EPA certifies that such response action is complete. Decree ¶¶ 161.d(i), 166.e, and170.d.

The Decree includes several safeguards to ensure that the covenants not to sue do not impede safe, complete response actions. One prerequisite to EPA certifying completion of any of the cleanups under the Decree is that GE must have achieved the Performance Standards for such response action. Decree ¶ 88.[35] Therefore, prior to EPA certifying that a response action has been completed, GE must have achieved the relevant cleanup standards or measures set by EPA. If EPA determines that GE has not achieved the Performance Standards, "EPA will notify [GE] in writing of the activities that must be undertaken by [GE] pursuant to this Consent Decree

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[35] The term "Performance Standards" includes cleanup standards, design standards and other measures or requirements from the Decree or other plans or statements of work to be performed. Decree ¶ 4 definition.

to complete the [response action] . . . and achieve the Performance Standards therefor . . .." Decree ¶ 88.a. Thus, achievement of Performance Standards is an effective barrier to an unwarranted covenant not to sue.

Finally, and very significantly, the covenants not to sue are subject to specific reservations of rights regarding new information or previously unknown conditions. These reservations, or 'reopeners', which are based upon the reservation requirements of Section 122(f)(6) of CERCLA, 42 U.S.C. § 9622(f)(6), are designed to address a congressional concern that responsible parties remain liable in the event that unknown information or conditions are discovered.[36] Specifically, Paragraphs 162, 163, 167, 168, 171, and 172 of the proposed Decree provide reservations of governmental rights to pursue GE for performance of other response actions at the Site or reimbursement of additional response costs for response actions at the Site, if previously unknown conditions or new information together with other relevant information indicate that an individual response action taken is not protective of human health or the environment. The reopeners ensure that the scope of the covenants remains appropriate and fair to the public and the government. Thus, the releases provided to GE are tailored to the facts of this case and are substantively fair.

Certain commenters objected to the settlement on the basis that the covenants provided in the settlement are too broad. Exhibit 2, Section II.C. Specifically, certain commenters argue that CERCLA does not provide authority for covenants not to sue for response actions other than CERCLA 'remedial actions', so the governments should not grant covenants with respect to the

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[36] See EPA, "Superfund Program: Covenants Not to Sue", 52 Fed. Reg. 28038 (July 27, 1987).

'removal actions' to be performed. Exhibit 2, Comments 11-12. The commenters misunderstand the law. The Attorney General has the exclusive power to conduct litigation in which the United States is a party, 28 U.S.C. § 516, including the discretion to settle cases and/or enter into consent decrees on any appropriate terms. See Swift & Co. v. United States, 276 U.S. 311, 331-2 (1928). This power is only limited where other statutes provide an express limit. 28 U.S.C. § 516. CERCLA does not provide such an express limit related to settlements involving removal actions. This interpretation of the scope of the government's authority has been upheld by the courts. United States v. Hercules, Inc., 961 F.2d 796, 798-800 (8th Cir. 1992) (holding that Section 122(f) does not limit the government's "exclusive authority" and "plenary power" to settle litigation on terms as it sees fit). Compare, United States v. Asarco, Inc., 814 F. Supp. 951, 957 (D. Colo. 1993)(court described a CERCLA cashout settlement as being "an inherent authority settlement"). Accordingly, the Attorney General's broad power to settle lawsuits on appropriate terms applies undiminished in this case. See also Exhibit 2, Response 11.

Another comment focused on whether the covenants release GE for possible recontamination at the Site or discovery of new information about contamination after completion of the cleanups, and whether the governments retain authority to require GE to address such recontamination. Exhibit 2, Comment 19. As noted above, the covenants not to sue are not absolute, and have significant limitations. In particular, the reopeners provide protection as to future events. Decree ¶¶ 162, 163, 167, 168, 171, 172, 176. Moreover, the Decree contains additional protections beyond the limitations in the covenants, such as the requirement that Performance Standards be met prior to Certification of Completion (Decree § XVIII), EPA's ability to unilaterally modify technical work submittals (Decree ¶ 39), the

government's recourse in an emergency (Decree § XIX), and periodic reviews of the continued protectiveness of the response actions (Decree § X). See also Exhibit 2, Response 19.

Accordingly, the limited covenants not to sue provided GE by the governments in the proposed Decree reinforce the substantive fairness of the settlement.

e. Appropriate Scope of Contribution Protection

One way of evaluating substantive fairness is the degree to which the settlement may affect the rights of non-parties. As with any EPA CERCLA settlement, the statute provides the Settling Defendant - here GE - with protection from contribution claims. 42 U.S.C. § 9613(f)(2).[37] That protection extends only to 'matters addressed' in the Consent Decree. Decree ¶¶ 191, 196. Accordingly, the Settlement is substantively fair in that it provides contribution protection that is consistent with CERCLA's statutory scheme.

Some commenters on the proposed Decree raised concerns about the Decree based on the scope of contribution protection. Exhibit 2, Comment 21 (A)-(D). The comments do not raise issues that affect the substantive fairness of the Decree. First, some commenters were concerned that GE may argue that contribution protection would extend to residential properties that did not receive PCB contamination through migration. Exhibit 2, Comment 21(A). That fear is unwarranted. GE's obligations under the Massachusetts ACO for cleanup of residential fill properties do not constitute obligations under the Decree (Paragraph 11), and therefore, GE does not receive contribution protection for performance of such obligations. Exhibit 2, Response

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[37] See United States v. Cannons Eng'g Corp., 899 F.2d at 92 (the contribution protection provision "was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle", citing H.R. No. 99-253 Part I (the provision will bring "an increased measure of finality to settlements")).

21(A).

Second, certain comments raised the concern that nothing in the Decree prevents GE from arguing later that the Decree extinguishes property damage or emotional distress claims. Exhibit 2, Comment 21(B). If the property is outside of the definition of the Site, the Decree has no legal impact on such claims. Further, the Decree includes an explicit statement of the parties' intent that the contribution protection provisions do not affect rights of persons with actual or potential claims other than contribution. Decree ¶ 196. Finally, the definition of the term "matters addressed in this Consent Decree" as it affects contribution protection clearly enumerates a number of matters addressed, without enumerating, for example, personal injury claims. Decree ¶ 191. See also Exhibit 2, Response 21(B).

Third, certain commenters were concerned that contribution protection is being provided for properties not yet identified. Exhibit 2, Comment 21(C). The commenter provided an example of, ten years from now, a property owner discovering that waste materials that originated at the GE Plant Area have migrated to his or her property, with the commenter expressing concern that such property owner would be unable to recover from GE even the costs of testing the extent of that contamination. Other than the areas already identified in the Decree and its appendices, the Site only includes properties or areas to the extent they are being investigated or remediated pursuant to the Decree. Decree ¶ 4. If a property is not identified, and thus not investigated or remediated under the Decree, such property is not part of the "Work" being performed at the Site, and contribution protection would not attach. See also Exhibit 2, Response 21(C).

Finally, a commenter questioned the potential for expansive future interpretation by this

Court of the scope of contribution protection. Exhibit 2, Comment 22. The consideration of a motion for entry of the Consent Decree is not the appropriate vehicle for trying to deduce every possible permutation of claims that could arise and whether they may be affected by contribution protection. As the First Circuit has stated, "[n]ot every aspect of interpretation of a consent decree need be resolved in the course of approval of the decree. Rather the court must address so much of the interpretation of the consent decree as needed to rule on the decree's fairness, reasonableness and fidelity to the statute." United States v. Charter Int'l Oil Co., 83 F.3d 510, 515-516 (1st Cir. 1996), citing United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1088-89 (1st Cir. 1994). This Court should not feel compelled to decide every nuance of contribution protection now and should enter the Consent Decree. United States v. Keystone Sanitation Co., Civ. A. No. 1: CV-93-1482, slip op. (M.D. Pa. Sept. 10, 1999) (court determined it need not decide every possible contingency in connection with evaluating a settlement). See also Exhibit 2, Response 22.

Consequently, the United States believes firmly that the Decree's contribution protection provision, with protection as delineated by CERCLA, exemplifies the substantive fairness of the Decree.

f. Other Protections for Property Owners

As demonstrated above, the Consent Decree, on its own terms, is substantively and procedurally fair. Nonetheless, in response to public comments, EPA has, outside of the Decree, offered additional assurances to property owners. Public comments expressed concern that in light of the governments' covenants not to sue GE, innocent property owners might in the future be burdened by potential liability for cleanup. Exhibit 2, Comment 22. In response to public

comments on the Decree, EPA announced, in April 2000, a number of enhancements to the cleanup process. Exhibit 7. Among those enhancements are several assurances designed to prevent innocent property owners from shouldering the uncertainties or liabilities of PCB contamination, including the following: ensuring a timely and efficient implementation of the cleanup options for commercial properties under the Decree; developing with property owners a procedure to respond to concerns about future activities and uses; providing a letter of clarification, upon request, to innocent homeowners stating that EPA will not pursue innocent homeowners for liability with respect to GE-related PCB contamination on their property consistent with EPA policy;[38] working with MADEP to address new contamination at previously remediated properties; and working with MADEP and other interested parties to improve the process for community involvement in the residential fill cleanup program. Exhibit 7, ¶¶ 4-8. See also Exhibit 2, Response 22. These commitments demonstrate the United States' intent for the costs and obligations of the Decree cleanups to be borne by the responsible party – GE.

Above are detailed many elements of the proposed Consent Decree which demonstrate its substantive fairness. The extraordinary scale of the cleanup and payment obligations on GE, the relatively minimal compromises by the governments, the limitations on the covenants not to sue, and the appropriate level of contribution protection are all sufficient indicia of substantive fairness. "EPA's expertise must be given 'the benefit of the doubt when weighing substantive fairness'". United States v. PREPA , 204 F.3d at 281, quoting United States v. Cannons Eng'g Corp., 899 F.2d at 88. The United States' expertise has put together a package that is fair and

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[38] See EPA, "Policy Toward Owners of Residential Property at Superfund Sites," July 5, 1991, which is available at the following internet location: http://es.epa.gov/oeca/osre/910703.html.

should be accepted by this Court.

Moreover, where the procedural process has been fair, it may be assumed that the resulting settlement is also substantively fair. Substantive fairness flows as a natural consequence from procedural fairness. United States v. Charles George, 34 F.3d at 1089. Therefore, this Court should find that the Consent Decree is procedurally and substantively fair, and should enter the Consent Decree.

5. The Settlement is Reasonable

Cannons dictates that in determining whether a CERCLA settlement is "reasonable", the Court should examine several factors, including: (1) the decree's likely efficaciousness as a vehicle for cleansing the environment; (2) whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures; and (3) the relative strength of the parties' litigating positions. United States v. Cannons Eng'g Corp., 899 F.2d at 89-90. These same factors apply to the CWA and RCRA. United States v. District of Columbia, 933 F. Supp. at 50; United States v. Bliss, 133 F.R.D. at 568. These factors further support entry of the settlement.

a. The Cleanups Will Be Protective

First, the proposed Decree is a remarkably effective vehicle for cleansing the environment. GE's cleanup obligations under the settlement will be both comprehensive and expeditious. GE has agreed to address PCB contamination both in the Housatonic River, and outside the River to eliminate unacceptable risks to human health or the environment.

In connection with consideration of this Consent Decree, the Court should rely on EPA's

technical expertise.[39] United States v. Cannons Eng'g Corp., 899 F.2d at 84; Sam Fox Publ. Co. v. United States, 366 U.S. at 689; Conservation Law Found. v. Franklin, 989 F.2d at 58; United States v. Charles George, 34 F.2d at 1085. Deference is particularly appropriate give the scope and complexity of the cleanup to be performed in connection with this settlement. The response actions were selected based on the risks derived from the different potential exposure to contaminants at various areas of the Site. The cleanup standards are designed to be protective based on current uses of the property. This methodology is consistent with the NCP and EPA policy. 40 C.F.R. § 300.430(d)(4); Decree, Appendix B (Selected Key Guidance Documents), Appendix C (Selected Key Guidance Documents), Appendix D (Selected Key Guidance Documents).

The Consent Decree provides for River cleanup in three segments, or 'reaches':

- For the Upper ½ Mile Reach Removal Action, GE is required to remove contaminated sediments and bank soils to meet Performance Standards; See Decree ¶ 20 and Appendix F for cleanup requirements; See Decree ¶ 31 and Appendix F, § 2.2 for Performance Standards.

- For the 1 ½ Mile Reach Removal Action, GE shall pay a substantial share of the costs of the response action, which will be implemented by EPA, including payment of 100%

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[39] Deference is consistent with the statutory regime relating to the review of EPA cleanup decisions. Pursuant to Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), judicial review of issues concerning the adequacy of EPA response actions is limited to the administrative record, and a court is to uphold EPA's response action decisions unless an objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law. See United States v. Seymour Recycling Corp., 679 F. Supp. 859, 861-62 (S.D. Ind. 1987); United States v. Northeastern Pharm. and Chem. Co., Inc., 810 F.2d 726, 748 (8th Cir. 1986), cert denied, 484 U.S. 848 (1987).

of the costs of the first $15 million in cleanup costs, and a 'sliding scale' of cost reimbursement thereafter.[40] The 1 ½ Mile Reach Removal Action will include Performance Standards relating to protecting human health and the environment. Decree ¶¶ 21, 32, 103-111.

- For the Rest of the River Remedial Action, GE shall perform and complete a CERCLA remedial action, including achievement of Performance Standards, following EPA's selection of the Remedial Action and all appeals and remands of that selection.[41] Decree ¶¶ 22, 32.

Taken together, these three phased components of Housatonic River cleanup demonstrate both a comprehensive approach to addressing PCBs in the River, and the placement of the lion's share of River response action work and costs on GE. The United States believes the technical components will effectively address the contamination and the phased approach will prevent recontamination. If the governments were to only obtain this comprehensive River cleanup in the proposed Decree, such achievement would itself be noteworthy. When combined with the other substantive elements of PCB risk reduction and cost recovery found in the Decree, however, the result becomes even more striking.

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[40] EPA expects to make a final determination on the appropriate response action for this Reach later in 2000, and expects to begin removal activities immediately after GE completes performance of the Upper ½ Mile Reach Removal Action, which EPA has scheduled for completion in May 2001. EPA estimates that the 1 ½ Mile Reach Removal Action will be complete by 2005.

[41] EPA is currently performing an investigation of contamination in the Rest of River. EPA is scheduled to recommend a remedial action approach in 2003, and EPA estimates that final selection of such action, and any appeals and remands are likely to take place prior to completion of the 1 ½ Mile Reach Removal Action.

In addition to the River response actions, GE shall undertake twenty-five separate Removal Actions Outside the River, involving substantial PCB removal work at many other Pittsfield locations. These Removal Actions include:

- ten separate cleanups of PCBs in soils at the former GE Plant Area;

- five separate cleanups to address the former river oxbows contaminated by PCBs;

- remediation at the Allendale School;[42]

- response actions involving some excavation and some capping at Silver Lake, a 26-acre Great Pond of the Commonwealth of Massachusetts, which has PCB contamination in its sediments and bank soils;

- cleanup of properties in the floodplain of the River, both residential and non-residential, which are contaminated by PCBs; and

- addressing groundwater contamination at the GE facility in Pittsfield.

See Decree ¶ 4 definition of "Removal Actions Outside the River".

These Removal Actions Outside the River address the potential health and environmental risks from GE's widespread contamination in soils, sediments and groundwater throughout Pittsfield largely using time tested and accepted cleanup approaches.[43] In all twenty-five of these response actions, covering over 300 acres, GE is required to *complete all work* and *pay for all*

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[42] The Allendale School Removal Action, which included removal of over 42,000 cubic yards of PCB-contaminated soil from a schoolyard, was completed in 1999 pursuant to Paragraph 16 of the Consent Decree. Exhibit 3.3, Janowski Declaration ¶ 6.

[43] The only even arguably novel cleanup approach in the Removal Actions Outside the River involves Silver Lake. Even there, the cap is a relatively simple design that is based on proven engineering concepts. Exhibit 2, Response 61. In addition, GE is responsible for ensuring the continuing protectiveness of the response. Decree ¶ 30.d.

work.

Each of the response actions under the Decree, when implemented and completed in accordance with the Decree and other relevant plans, will be protective of human health and the environment.[44] See Decree ¶ 8.b. Furthermore, GE must attain Performance Standards for each of the response actions prior to EPA certifying completion of such action; GE receives no covenant for future liability until EPA provides the certification of completion of each response action. Decree § XVIII; ¶ 161.d(i). Moreover, as described above in Section IV. A.4.d, the governments reserve additional authority under the Decree to the extent new information or previously unknown conditions are discovered that indicate a response action is not sufficiently protective. Decree ¶¶ 162, 163, 167, 168, 171, 172.

Not only are the cleanups required under the proposed Consent Decree comprehensive, they also provide expeditious relief from PCB contamination. In addition to already having completed the Allendale School Removal Action, GE has implemented several Source Control actions and is currently implementing additional Source Control actions and the Upper ½ Mile Reach Removal Action. The Source Control actions to date include: expansion of the use of automated NAPL collection systems; increased frequency of manual NAPL collection; and the

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[44] The Decree and its many Appendices and Attachments include a vast number of compliance requirements, cleanup performance standards, opportunities for State review and requirements for EPA approvals of GE submittals, opportunities for public input, and technical safeguards such as monitoring and reporting devices that provide great assurance of the efficaciousness of the cleanup approaches. See, e.g., Section VI (Performance of Response Actions by Settling Defendant), Section IX (Performance Standards and Related Requirements), XIV (Reporting Requirements) and XV (EPA Approval of Plans and Other Submissions) of the proposed Decree, and Appendices E (Statement of Work for Removal Actions Outside the River), Volumes I-IV, and F (Removal Action Work Plan for the Upper ½ Mile Reach of the Housatonic River).

installation of impermeable sheetpile walls to form an effective physical barrier to prevent NAPL from flowing into the River. Exhibit 3.2, Tagliaferro Declaration ¶ 3. With respect to the Upper ½ Mile Reach, GE began removing PCB-contaminated sediments from the River in November 1999, and as of May 22, 2000, has removed approximately 3580 cubic yards of sediments and bank soils, as well as 1750-1800 gallons of NAPL from the River. Exhibit 3.2, Tagliaferro Declaration ¶ 4.

Commenters on the proposed Decree have raised technical concerns about different aspects of the overall cleanup. In Exhibit 2, Responses 26-75, the United States responds in detail to the comments which raise issues about the technical adequacy of the settlement. None of the comments demonstrate that the settlement is not reasonable. Several overall concerns are addressed below.[45]

Commenters expressed concern about the use of On Plant Consolidation Areas ("OPCAs") at the Site, with particular focus being the commenters' preference for treatment instead of consolidation.[46] With respect to consolidation of waste instead of treatment, EPA has

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[45] In addition to comments expressing concern with the Decree, nearly forty comments were received that are favorable regarding the Decree. Also, in one instance, an individual interviewed as part of a set of comments expressing concern with the Decree, in fact supports the Decree going forward in its present form. Remo Del Gallo, former mayor of Pittsfield, is interviewed as part of the submission of the Housatonic River Initiative, which raises concerns about the technical adequacy of the cleanups. Exhibit 1, MA-44. Mr. Del Gallo, by a letter of June 9, 2000, clarified to EPA that "even though some portions of the Consent Decree are not perfect, I support the finalization of the Consent Decree in its current form." Exhibit 18.

[46] See Exhibit 2, Comments 40-49 and Responses thereto for the complete set of responses regarding OPCAs.

selected for the Site a combination of containment in OPCAs, engineered barriers[47] and institutional controls, and appropriate off-Site disposal, including treatment of principal threat wastes. EPA's approach is consistent with the National Contingency Plan ("NCP"), 40 C.F.R. Part 300, as well as implementing guidances.

In general, EPA separates the universe of wastes into two categories: principal threat wastes and non-principal threat wastes. See Exhibit 2, Response 40. Principal threat wastes are defined to include liquids, high concentrations of toxic compounds and highly mobile materials. Decree, Appendix D at 38; 40 C.F.R. § 300.430(o)(1)(iii)(A), (B), (C). Specifically for this Site, the principal threat wastes include the transformer oils and liquid wastes that have historically been treated at this Site and any similar wastes that may be recovered as part of the removal actions at the Site. Decree, Appendix D at 38. Any liquids, free product, drums, capacitors and other equipment that contains PCBs within its internal components, and asbestos-containing materials that may be encountered as part of the Removal Actions will not be added to the consolidation areas. These principal threat wastes will be disposed appropriately off-Site either through treatment or through another method that complies with appropriate disposal regulations. Decree ¶ 15.a(ii), Appendix D at 38.

Because of their physical characteristics, non-liquid PCBs in soil generally do not migrate. Decree, Appendix D at 38. Therefore, the majority of the PCB-contaminated soil at this Site may be considered non-principal threat wastes. Non-principal threat wastes, which present a relatively low, long-term threat, will be addressed using a combination of engineering

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[47] An engineered cover is a permanent cap that is designed, constructed, and maintained to isolate and contain underlying soils and other materials. Decree, Attachment G to Appendix E.

controls (e.g. consolidation and capping, surface water controls) and institutional controls (e.g., environmental restrictions and easements). Decree § VII, Appendix D at 38. This strategy is consistent with two EPA publications on this issue, A Guide to Principal Threat and Low Level Threat Wastes, Superfund Publication 9380.3-06FS, November 1991 (Exhibit 16 hereto) and Rules of Thumb for Superfund Remedy Selection, OSWER Directive 9355.0-69, August 1997.[48] See Exhibit 2, Response 40.

The consolidation areas have been designed to be protective of human health and the environment and to provide long-term effectiveness and reliability in controlling the consolidated non-principal threat wastes. See Exhibit 2, Section III.B (in particular Responses 44, 45). All of the consolidation areas are outside the 100-year flood plain of the Housatonic River, Silver Lake, and Unkamet Brook. The cover design, coupled with the physical characteristics of PCBs, will minimize the leaching potential of PCBs to groundwater. [49] The Consent Decree also requires that GE provide additional measures of protection in the event that any leaching does occur. For

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[48] The strategy is also consistent with other relevant EPA guidance which identifies the presumptive remedy for CERCLA (i.e., Superfund) municipal landfills and military landfills, respectively, as containment. Agency Directive No. 9355.0-49FS (Sept.1993) and Agency Directive No. 9355.0-67FS (Dec.1996).

[49] The cover system layers will consist of a composite construction using two impermeable barriers - a 60 mil geomembrane blanket with a geosynthetic clay layer ("GCL") over a layer of consolidated materials. The GCL will, if wetted, swell into a third impermeable barrier. The geomembrane provides the initial level of protection against infiltration. Immediately above the membrane, a porous plastic drainage layer is installed to carry away rain and snow melt thus minimizing infiltration. The surface of the cap will be covered with several feet of clean soil. The top 6 inches will be top soil, treated with lime and fertilizer and seeded with a "conservation mix" to establish vegetation to further reduce infiltration and enhance habitat value for birds. The cover system also helps to prevent infiltration of precipitation. See generally Decree, Attachment G to Appendix E; Exhibit 2, Response 44.

the Building 71 and New York Avenue/Merrill Road OPCAs, where the higher concentrations of PCBs and other constituents will be placed, the Consent Decree requires that GE utilize not only a cover system but also a liner and leachate collection system. If leachate is collected in the system, the leachate will then be taken out of the collection system and transported for proper disposal/treatment.[59] The cover system is also designed to reduce contaminants from being released from the OCPAs into the air. Air monitoring will be performed to ensure that no unacceptable exposure will occur during construction of the OPCAs. Additional site controls and practices are required to prevent the potential for dust generation. These controls include placement of daily and interim cover and the utilization of water spraying as necessary. Decree, Annex 1 to Appendix E, at 6-4.

Consolidation is particularly appropriate here given that the facility is subject to widespread contamination, that most of the material to be consolidated will originate from the GE Facility, and that the consolidation areas will be constructed in portions of the facility already containing contaminated soil. In addition, treatment, either of contaminated soil throughout the Site or of the contents of the Hill 78 landfill, is not practicable due to the immense volume of contaminated soils. Compare, Rules of Thumb for Superfund Remedy Selection, OSWER Directive 9355.0-69 (large volume of material at a site may make treatment impracticable). See

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[59] In order to prevent any potential release to the River, the Consent Decree also requires that GE set up a system of monitoring wells immediately adjacent to and surrounding the consolidation areas which will detect any elevated levels of contaminants many years before a release to the river could occur. Decree, Attachment H to Appendix E; Exhibit 3.*, **Declaration** ¶. In addition, the Consent Decree requires that GE monitor a line of perimeter wells which are further away from the OCPAs as an added layer of protection. Id. GE is required to propose corrective actions if elevated levels of PCBs or other constituents are discovered in any groundwater monitoring wells. Id.

also Exhibit 2, Section III.B.

To summarize, EPA has selected a combination of containment, institutional controls and appropriate off-site disposal, including treatment where required by applicable disposal regulations. The Agency's decision to require appropriate off-site disposal, including treatment, for principal threat wastes and to require consolidation, with specific engineering and institutional controls, for non-principal threat wastes is consistent with the NCP and subsequent EPA guidance.

Certain comments also raised concerns as to the adequacy of one of the OPCAs, Hill 78, given its proximity to Allendale School. Exhibit 2, Comment 44. The OPCAs will be protective of human health and the environment. First, the consolidation areas are located hydrologically downgradient from Allendale Elementary School and the surrounding residences. Exhibit 3.1, Olson Declaration ¶ 11. Any release to groundwater from the consolidation areas, if a release were to occur, would move away from Allendale School and the surrounding residential community. Further, during placement of materials within the Hill 78 Consolidation Area, GE is required to implement a series of controls aimed at protection of human health and the environment. Specific controls to be implemented include maintaining security of consolidation areas, air monitoring, surface water run-off and erosion controls, and placement of daily and interim covers. Decree, Attachment G and Annex 1 to Appendix E.

In addition to objections to the OPCAs, some commenters have questioned the effectiveness of measures to control the sources of contamination.[51] Commenters expressed

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[51] Exhibit 2, Comments 58 - 60.

concern that plumes of non-aqueous phase liquids ("NAPLs") may recontaminate the River unless EPA requires additional measures of GE. As recommended by the commenters and already incorporated into the Decree, EPA has forced GE to undertake a number of aggressive measures for monitoring and removing NAPLs to protect the River from recontamination. Examples of these requirements include the following: expansion of the use of automated NAPL collection systems, and increased frequency of manual NAPL collection; installation of impermeable sheetpile walls to form an effective physical barrier to prevent NAPL from flowing into the River; and in one area requiring GE to implement a NAPL response plan in conducting the Upper ½ Mile Reach Removal Action. Exhibit 3.2, Tagliaferro Declaration ¶ 3; Exhibit 2, Response 58. Pursuant to the NAPL response plan GE has been required to pump out 1750-1800 gallons of NAPL from the area, and has excavated river sediments, where necessary, to a depth of eight feet. Exhibit 3.2, Tagliaferro Declaration ¶ ¶ 3, 4; Exhibit 2, Response 58. If NAPL is encountered in sediments in other areas of the Upper ½ Mile Reach, then GE is required to pump out the NAPL and/or excavate the sediments to a minimum depth of four feet. If NAPL is observed emanating from the banks, then GE is required to remove the NAPL and/or install a physical barrier to prevent the NAPL from discharging into the River. Decree, Appendix E, Attachment H; Exhibit 2, Response 58. Accordingly, the Decree requirements are an effective mechanism to control potential recontamination to the River.

In summary, the United States, after careful consideration of the public comments in this regard, reiterates EPA's determination that the response actions already selected and to be performed pursuant to the proposed Decree are technically adequate and will be protective of human health and the environment. EPA's determination on such issues is well within the law

and relevant policy and guidance. Accordingly, the first element of the reasonableness standard is met.

b. The Decree Provides Adequate Compensation

The second factor in evaluating reasonableness, whether the public is adequately compensated, is easily satisfied by the proposed settlement. Upon entry of the Decree, GE, the responsible party in this action, is required to perform cleanup work and restoration work, provide compensation for natural resource damages, and reimburse government costs to a value of approximately $ 300-700 million. Under the terms of the settlement, the United States will recover 90 - 97 % of expected Site costs related to the cleanups. See Section IV. A.4.c. above. The public's compensation is thus notable not only due to the size of the benefits, but also because of the relatively small amount of compromise. No one seriously questions that the settlement adequately compensates the public as to response actions.[52]

In terms of NRD, this settlement represents one of the largest NRD settlements in New England with a value of over $25 million plus the value of primary restoration that arises as a result of the response actions that will be undertaken. See Section IV.A.4.b. This settlement package adequately compensates the public for natural resource damages. Certain commenters raised concerns at the size of the payments to be made as part of the NRD component of the settlement in comparison to the figures set out in a report by the Trustees consultant, IEc. Exhibit 2, Comment 76. Those concerns are unwarranted.

First, a key element of the NRD settlement for the Site is the response action (or response

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[52] The questions relating to the scope and effectiveness of the cleanup are within the technical adequacy component and are addressed in Section IV. A.5.a.

actions) to be developed and carried out under the proposed Consent Decree. In the context of NRD, the response action is considered to be "primary restoration" or actions that eliminate or reduce residual natural resource injury and which accomplish restoration when possible and/or provide the foundation for restoration, replacement or, more importantly, natural recovery. To ensure that the natural resource trustees' concerns and recommendations are considered as part of the response actions to be developed and performed, the management structure established through the proposed Consent Decree for review and implementation of response actions will include trustee participation when natural resources are affected (*see* paragraph 13, page 56, of the proposed Consent Decree). The IEc preliminary estimate of damages did not evaluate this critical element of the NRD settlement. Exhibit 2, Response 76.

Second, IEc's evaluation of NRD (i.e., compensable dollar values resulting from lost natural resource service flows) was based strictly on rudimentary scenarios that assumed no response action, or response actions that hypothetically achieved uniform contaminant levels over varying periods of time. These analyses did not take into consideration (and could not have considered) response action that has since been completed,[53] response action that is planned for the future, or combinations of response and restoration actions that may be implemented in the future -- all of which would serve to discount the estimated range of NRD. Exhibit 2, Response 76.

Third, the damage estimates presented in IEc's original report, and later updated based on research in Massachusetts and Connecticut, were intended to inform the Trustees as to the

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[53]For example, GE has already undertaken response action in a portion of the River that IEc assumed would not be addressed for years.

potential magnitude (i.e., potential upper limit) of dollar damages that might be demonstrated through primary research.[54] The preliminary estimate generates a ballpark estimate of damages, sufficient for both settlement and planning further research, but not for trial which requires a much greater base of information. Further, the report was not designed or intended to account for other relevant factors such as the time, cost and uncertainties associated with establishing a NRD claim in court.[55] In short, the IEc preliminary estimate of damages was not designed or intended to evaluate or value the possible broad range of alternative scenarios, or combination of scenarios, that could constitute reasonable and acceptable compensation for NRD. The

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[54] Consistent with the U.S. Department of the Interior regulations for NRD assessments under CERCLA, the preliminary estimate of damages was based on existing data and a limited amount of new data (*see* 43 C.F.R. §11.38)

[55] As set out above, it is erroneous to directly compare the figures in the IEc Report and the cash payments being made for NRD. Nevertheless, under such a comparison the proposed NRD settlement can be reconciled with the estimated damages in the IEc Report. See Exhibit 2, Response 76. First, the largest component of the IEc estimate is for passive use losses with an estimated range of $25 to 250 million. The broad range of this estimate reflects the tremendous technical complexities associated with developing this component of a NRD claim -- even before considering litigation risks and other factors not even associated with the specific complexities of passive use analysis. In this particular case the governments, after carefully considering all factors affecting the NRD claim, determined that substantially discounting the estimates for the passive use element of the NRD claim was appropriate. Hence, for purposes of achieving a fair and reasonable NRD settlement, the governments focused on those elements of the NRD claim that were supported by more quantifiable and tangible analyses -- recreational fishing and boating, and lost ecological services. With respect to recreational fishing and boating the IEc Report estimated a damages range of $11 to 32 million dollars. With respect to ecological services IEc performed a modeling analysis that estimated ecological service losses in terms of habitat acreage loss of approximately 12,000 acres due to PCB contamination (see exhibit 10 to governments' Memorandum of Law). Under the proposed Consent Decree, when combining the approximately $25 million in compensatory NRD along with the primary restoration to be accomplished through response actions (i.e., response actions that will address thousands of acres of PCB contaminated natural resource habitat), the NRD component of the settlement is well within an acceptable range of the total estimated losses for recreational uses and ecological services.

sufficiency of the NRD components of the settlement cannot be seriously challenged. Exhibit 2, Response 76.

Therefore, the second prong of the reasonableness inquiry is met.

c. The Settlement Appropriately Reflects Litigation Risks and Other Considerations

The final component of reasonableness is an evaluation of the relative strength of the parties' litigating positions. United States v. Cannons Eng'g Corp., 899 F.2d at 90 ("the reasonableness of a proposed settlement must take into account foreseeable risks of loss"); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1036 ("An interpretation of [CERCLA] more in keeping with the intent of, as well as the language employed by, Congress is one that requires the United States to assess the strengths and weaknesses of its case and drive the hardest bargain that it can."). A review of this matter reinforces the reasonableness of the Decree. If forced to litigate the liability and technical issues resolved in the Decree, the United States believes it would prevail. Nonetheless, as with any technically complex case, issues can arise that delay or create uncertainty regarding the eventual resolution.

One example illustrates this point as to the claims related to the response actions. In response to the 1998 UAO EPA issued for the Upper ½ Mile Reach Removal Action, GE filed six different sets of comments, totalling approximately 270 pages. These comments not only disputed EPA's authority to issue the UAO, but raised numerous technical objections to the Action Memorandum underlying the UAO, the EPA Human Health Risk Assessment for the Action Memorandum, the U.S. Army Corps of Engineers' Analysis of Remediation for the Action Memorandum, and the EPA Ecological Risk Assessment for the Action Memorandum.

GE's comments on the UAO are noteworthy because they demonstrate the number and complexity of potential issues that can be raised --- *and this is only one of the twenty-eight response actions subject to this settlement.*

While the United States believes its decisions would be upheld, avoiding the potential for delay and the transfer of necessary resources to litigation instead of oversight of cleanup is a relevant consideration in evaluating reasonableness. By avoiding discovery and a lengthy trial, the governments' reduction in transaction costs is significant. This is a legitimate factor in deciding to compromise certain costs. As the First Circuit pointed out in Cannons: "to the extent that time is of the essence or that transaction costs loom large, a settlement which nets less than full recovery of cleanup costs is nonetheless reasonable." United States v. Cannons Eng'g Corp., 899 F.2d at 90. Here, where the comprehensive Decree includes twenty-eight separate actions, worth several hundred million dollars, the potential for contentious and time-consuming litigation is even greater. Thus, the reasonableness of this settlement cannot seriously be disputed.

The reasonableness justifications articulated above are equally applicable with respect to the governments' claims for natural resource damages ("NRD").[56] In this matter, the governments developed a thorough estimate of the nature and extent of NRD,[57] and then carefully negotiated a fair and reasonable settlement after consideration of a variety of litigation

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[56] For a detailed discussion of the reasonableness of the governments' evaluation of the proposed NRD settlement see Exhibit 2, Section IV.

[57] See the report prepared by Industrial Economics, Inc. ("IEc") and materials used by the Trustees to explain the NRD settlement attached to this Memorandum as Exhibits 9 and 10.

risks and time saving factors with respect to their NRD claims. See United States v. AMTRAK, No. Civ. A. 96-1094,1999 WL 199659, at *13 – *14 (E.D.Pa.) (reasonable NRD estimate provides sufficient basis to engage in negotiations for settlement); United States v. Montrose Chem. Corp. of California, 50 F.3d 741, 746–747 (9th Cir. 1995) (same); United States v. Charles George Trucking, 34 F.3rd 1081, 1087 (1st Cir. 1994) (same).

A few examples suffice to illustrate the point. First, GE has argued that the NRD claims at the Site are barred by the statute of limitations provisions in 42 U.S.C. § 9613(g). These provisions are very complex and may affect a NRD claim based on a particular site's status under CERCLA as well as the length of time from discovery of the natural resource injury. Although the governments believe their arguments would prevail, the outcome is not assured. See, e.g., United States v. Asarco, Inc., 28 F. Supp.2d 1170 (D. Idaho 1998) (precluding natural resource claims for areas not listed on the NPL), rev'd on other grounds, __ F.3d __, 2000 WL 767702 (9th Cir. June 15, 2000); United States v. Montrose, 883 F. Supp. 1396, 1406 (D.C. Cal. 1995) (barring action based upon length of time government knew about contamination), rev'd on other grounds sum nom, California v. Montrose Chem. Corp., 104 F.3d 1507 (9th Cir. 1997). Also see, Kennecott Utah Copper Corp. v. United States, 88 F.3d 1191(D.C. Cir. 1996)(rejecting favorable interpretation of limitations period). Accordingly, the proposed Consent Decree is an appropriate compromise.

In addition to the statute of limitations challenge, the governments faced the risks inherent to all NRD claims because of the "causation" requirement the governments must meet under CERCLA in proving NRD (*see* 42 U.S. C. §9607(a)(4)(C)) and because of the complexity of the methods used to place value on natural resource injury and other categories of natural

resource damages, particularly active human uses (i.e. recreational boating and fishing) and passive human uses (i.e., aesthetics). See Exhibit 2, Responses Section IV.

While the United States is confident that it could establish liability and the amount of NRD it is appropriate for the governments to consider the time and expense of litigation in resolving these claims too. To present a NRD claim at trial would have cost the governments millions of dollars. In this instance, the trustees will have immediate control over significant settlement funds, over $15 million plus interest, and perhaps more importantly, the settlement provides a framework for expeditious restoration of, and long term benefits to, natural resources. See Acushnet River, 712 F. Supp. at 1029. (immediate transfer of money to the trustees is a significant factor in settlement). Because the NRD component of the settlement consists of multiple elements, and is not solely a cash settlement, its value is further enhanced. Although CERCLA allows for the recovery of "damages," the objective of the NRD provisions in CERCLA is to effectuate the restoration of injured natural resources. See 42 U.S.C. § 9607(f)(1). Further, Section 122 overall, and Section 122(j) specifically, of CERCLA, 42 U.S.C. §§ 9622, 9622(j), contemplate and encourage settlements of the type entered into with GE and PEDA with respect to combining response action and natural resource restoration. [58] Thus,

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[58] *See* CERCLA Section 104(b)(2), 42 U.S.C. § 9604(b)(2) (requiring coordination between natural resource trustees and response agencies during development of response actions); NCP, 40 C.F.R. §§ 300.135(j), 300.160(a)(3), 300.430(b)(7), 300.615(c)(1)(ii), and 300.615(e)(2)) (provisions implementing CERCLA § 104(b)(2)); CERCLA § 122(j); and *See* H.R. Rep. No. 99-253(IV), at 47, *reprinted* in 1986 U.S.C.C.A.N. at 3077 ([intent of CERCLA § 104(b)(2) is to coordinate response actions with NRD actions] ". . .so as to increase the overall efficiency . . . and the compatibility of the remedial investigations and natural resource investigations undertaken at any one site."); H.R. Rep. No. 253, 99th Cong., 1st Sess. 20 (October 31, 1985) (§113(g)(1) was added to CERCLA in part to reflect the fact that ". . . a remedial action at a site may include the restoration, rehabilitation, or replacement of natural resources . . . ."); H.R. Rep.

even if some contend that the governments have not achieved the very best deal possible, when considered in light of the relative risk, expense and time of litigation, the governments have achieved a settlement of more than substantial merit.

Accordingly, the proposed Consent Decree is clearly reasonable. The comprehensive, expeditious, and protective remediation makes it a very effective cleanup vehicle; the cleanup, cost reimbursement and NRD components adequately compensate the public; and the settlement reflects the relative strengths of litigation positions.

6. The Settlement Is Faithful To The Objectives Of CERCLA, RCRA And The CWA And Is In The Public Interest

The First Circuit has recognized "two essential purposes" of CERCLA: "to provide for prompt and effective response to the problems of national magnitude" resulting from release of hazardous substances and to place the "costs and responsibility for remedying" the same on responsible parties. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)(quoting United States v. Reilly Tar & Chem. Co., 546 F.Supp. 1100, 1112 (D.Minn. 1982)); see also United States v. Charles George, 34 F. 3d at 1086 (overarching goals of CERCLA include accountability, desirability of unsullied environment, and prompt response activities); In re Jensen, 995 F.2d 925, 927 (9th Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992). Similar purposes of RCRA and the CWA are the protection and enhancement of the quality of the water and soil so as to promote the public health

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No. 99-253 (III) at 21, reprinted in 1986 U.S.C.C.A.N. at 3044 ("The amendment to [§ 104(b)(2) calling for comprehensive coordination between EPA and natural resource trustees] also contemplates that the court will review the record compiled to determine the remedy together with the record compiled for assessing damages, and will, whenever practicable, rule on them together.").

and welfare. See, e.g., 33 U.S.C. § 1251(a), 42 U.S.C. §§ 6901 and 6902. See also, United States v. District of Columbia, 933 F. Supp. at 52 (court found a CWA decree to be in the public interest because it contributed to the "restoration and maintenance of the chemical, physical and biological integrity of the nation's water").

Other important purposes of CERCLA are to promote finality and reduce transaction costs. See 42 U.S.C. § 9622(a); 1986 U.S.C.C.A.N. at 3055; United States v. Cannons Eng'g Corp., 899 F.2d at 90; United States v. Hooker Chem., 540 F. Supp. at 1072; United States v. Rohm & Haas, 721 F. Supp. at 696. See also United States v. Conservation Chem. Co., 628 F. Supp. 391, 403 (W.D.Mo. 1985). In fact, there is a general public policy in favor of settlement to reduce costs to litigants and burdens on the courts. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) cert. denied, 464 U.S. 818 (1983). The Decree furthers these goals.

The Decree calls for an expeditious and comprehensive cleanup program for dealing with massive areas of contamination in Pittsfield and in and around the Housatonic River. In this action, the immediate response began even prior to entry of the Decree. Section IV. A.4-5 above. See also Decree ¶ 16. The cleanups will be effective at eliminating unacceptable risks posed by PCBs and other hazardous substances. Section IV. A.5 above; Decree ¶ 8, and Appendices B, C, D. The Decree provides the governments additional recourse if new information later shows that any cleanup is not protective of human health and the environment. Exhibit 2, Response 13; Decree ¶¶ 162, 163, 167, 168, 171, 172. In short, the Decree is a very efficacious vehicle for providing a prompt response to contamination at the Site thus protecting public health and the environment.

The Decree also is very effective at placing the costs for this response on GE – the party

responsible for the damage. As discussed above, GE is paying for and performing virtually all of the several hundred million dollar comprehensive cleanup, and paying the lion's share of other related costs. Moreover, any compromises made by the governments in this settlement are quite minimal compared to the value of recovery, and quite understandable in light of the prospects of proceeding through litigation. Section IV. A.5.c.

The settlement also meets the goals to provide final resolution of liability for settling parties and reducing litigation and transaction costs. The United States was able to secure an agreement without pursuing discovery and pretrial proceedings.

The same reasons that demonstrate that the Consent Decree is consistent with the goals of CERCLA, RCRA and the CWA also establish that the settlement is in the public interest. Therefore, the final criterion to support entry of the Decree is satisfied.

B. THE REMAINING OBJECTIONS TO THE SETTLEMENT EXPRESSED IN THE SUBMITTED COMMENTS PROVIDE NO BASIS FOR REFUSING TO ENTER THE CONSENT DECREE

The United States has established that the proposed settlement is fair, reasonable, consistent with the goals of CERCLA, RCRA, the CWA and in the public interest. Thus, the Court should sign the Decree and enter it as a final judgment. In connection with those arguments, the United States has addressed various comments on and objections to the Decree. Many of the comments do not neatly fit within the First Circuit's analytical framework. Accordingly, the United States has provided its responses to each of the comments submitted in the detailed Responses to Comments attached as Exhibit 2. Two further comments warrants mention.

First, one commenter objected to the settlement because EPA determined to pursue

response actions at the Site (except for the Rest of the River) as CERCLA 'removal' actions instead of 'remedial' actions. The commenter stated that removals are not appropriate, and did not allow for proper procedural safeguards. Exhibit 2, Comment 25. The United States disagrees. Not only did EPA properly characterize response actions at the Site as either "removal" or "remedial" action, depending upon the response action selected, but EPA provided more opportunity for citizen involvement in cleanup selection than is required by law, regulation, or policy. As the following demonstrates, the concern about EPA's reliance upon "removal" actions is misplaced and does not weigh against entry of the Decree.

CERCLA vests EPA with authority to select "remedial" or "removal" actions to clean up hazardous substances in the environment. Removal actions are defined by CERCLA to include the "cleanup or removal of released hazardous substances from the environment," "actions as may be necessarily taken in the event of the threat of release of hazardous substances into the environment" and "such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." 42 U.S.C. § 9601(23). The statute then provides a non-exclusive list of actions that could be classified as removals. 42 U.S.C. § 9601(23). The definition of removal action set forth in the National Contingency Plan ("NCP")[59] mirrors the statutory definition, and provides further examples of appropriate removal actions, including fencing, capping, excavation, consolidation, and containment. 40 C.F.R. §§ 300.5 and 300.415(e). The NCP also enumerates factors to consider in determining whether removal actions are appropriate to abate the threat of contamination. 40 C.F.R. § 300.415(b).

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[59] The NCP was promulgated by EPA, at the direction of Congress, to standardize response to environmental contamination. 42 U.S.C. § 9605; 40 C.F.R. Part 300.

Similarly, "remedial" actions are defined as those actions taken "to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or the environment," including such actions as permanent relocation of residents, offsite transportation and/or treatment of hazardous substances. 42 U.S.C. § 9601(24). Because the broad definition of "remedial" action overlaps with the broad definition of "removal" action, there are circumstances such that either a removal or remedial action is appropriate. For example, the NCP recognizes instances where "removal" actions can be lengthy, permanent, and costly.[60] This structure provides EPA with the necessary flexibility to respond quickly and appropriately to environmental contamination.

EPA has determined that contamination at the Site is best addressed through a combination of remedial and removal actions. Because further investigation is appropriate for the Rest of River, EPA is pursuing that component of the Site as a CERCLA remedial action. Exhibit 3.1, Olson Declaration at ¶ 12. For the remainder of the Site, EPA determined that removal action authority is appropriate for responding to the PCB contamination. EPA's

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[60] For example, NCP Section 300.415(b)(4) sets forth the criteria for non-time critical removal actions, and Section 300.415(b)(5) establishes criteria for longer-term, more expensive removals. While CERCLA and the NCP generally require that CERCLA removal actions be terminated after $2.0 million has been obligated, or 12 months have elapsed since the date the removal action began, 42 U.S.C. § 9604(c)(1); 40 C.F.R. § 300.415, there are several exceptions. First, these time and cost limitations do not apply to removal actions undertaken by private parties, 40 C.F.R. § 300.415(k)(3). Second, under the statute and the NCP, EPA may exceed those limits where there is an immediate risk to public health or welfare of the United States or the environment, and continued response actions are immediately required to prevent, limit or mitigate an emergency, and such assistance will not otherwise be provided on a timely basis. CERCLA; 40 C.F.R. § 300.415(b)(5)(i). And finally, EPA may also continue the removal action if continued response action is otherwise appropriate and consistent with the remedial action to be taken at the site. 40 C.F.R. § 300.415(b)(5)(ii).

determinations regarding removal actions are appropriate, and EPA's involvement of the public has far exceeded statutory or regulatory requirements.

In determining whether a removal action is appropriate, the NCP provides that EPA shall consider a myriad of factors.[61/] EPA need not satisfy all the criteria set forth at 40 C.F.R. § 300.415(b)(2) to select a removal action, EPA need only determine, based upon a consideration of the factors, that "there is a threat to public health or welfare of the United States or the environment." 40 C.F.R. § 300.415(b)(1). No one criterion, "taken alone, adequately characterize[s] a response action as a removal or remedial action. The better approach is to view

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61/ The factors are:

(i) Actual or potential exposure to hazardous substances or pollutants or contaminants by nearby population, animals or food chain;

(ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;

(iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;

(iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

(vi)Threat of fire and explosion;

(vii) The availability of other appropriate Federal or State response mechanisms to respond to the release; and

(viii) Other situations or factors which may pose threats to public health or welfare or the environment.

40 C.F.R. § 300.415(b).

the action. . . in light of several factors: the cost, complexity, and duration of the cleanup; the immediacy of the release or threatened release; and the nature of the action taken." Tri-County Business Campus v. Clow Corp., 792 F. Supp. 984, 993 (E.D. Pa. 1992) (quoting BCW Assocs., Ltd. V. Occidental Chem. Corp., Civ. A. No. 86-5947, 1988 WL 102641 at *19 (E.D. Pa. Sept. 29, 1988)).[62] Such an analysis supports EPA's decisions here.

In determining the appropriateness of removal action authority at the Site, EPA evaluated the Site contamination information. Decree, Appendices B, C, D. EPA relied upon years of scientific data gathered at the Site. The areas selected for removal actions had been subject to considerable study and investigation dating back to the early 1980s. See Decree, Appendix B at 5-11, including index of supporting reports; Decree, Appendix C at 3-4, including index of supporting reports; and Decree, Appendix D at 6, including index of supporting reports. These numerous studies include investigations undertaken by MADEP, EPA, or GE under the supervision of EPA or MADEP. Given this wealth of existing data, EPA determined that further study was not necessary and removal actions were appropriate to respond quickly to conditions present at certain portions of the Site.

For example, with respect to the Upper Two-Mile Reach, the Upper Reach Action Memorandum documents the exposure to nearby human and animal populations. Decree, Appendix B at 12-14. In addition, the Upper Reach Action Memorandum further evaluates the

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[62] See also, United States v. Vertac, 33 F. Supp. at 184 (potential weather events which might spread contamination justified removal action); Carlyle Piermont Corp. v. Federal Paper Board Co., 742 F. Supp. 814, 820-21 (S.D.N.Y. 1990) (immediacy of environmental threat justified removal action); Channel Master Satellite v. JFD Electr. Corp., 748 F. Supp. 373, 385 (E.D.N.C. 1990) (imminence of risk to public health or environment key determinant of removal action);

threat of PCB migration, of PCB contamination to sensitive ecosystems, and that flooding may further spread PCB contamination. Decree, Appendix B at 14-16. Accordingly, EPA concluded the Upper Two-Mile Reach satisfied at least four of the NCP criteria for removal action. 40 C.F.R. § 300.415(b)(2)(i), (ii), (iv), and (v).

Likewise, EPA concluded in the Allendale Action Memorandum that there was a threat to human populations to PCB contamination, due to the "potential for future direct contact with hazardous substances in soils." Decree, Appendix C at 5-7. Thus, EPA determined that the Allendale School satisfied at least one of the NCP removal action criteria. 40 C.F.R. § 300.415(b)(2)(i). And finally, with respect to the other Removal Actions Outside the River, EPA concluded removal actions were appropriate in all instances due to the threat of PCB exposure to human populations. 40 C.F.R. § 300.415(b)(2)(i). Some areas also presented a threat to sensitive ecosystems, 40 C.F.R. § 300.415(b)(2)(iv); and some were subject to flooding, 40 C.F.R. § 300.415(b)(2)(v); and otherwise vulnerable to PCB migration, 40 C.F.R. § 300.415(b)(2)(ii). Decree, Appendix D at 23-29. In sum, with respect to all the removal actions selected, EPA determined based upon the relevant NCP factors that removal action was appropriate and necessary to "abate, prevent, minimize, stabilize, mitigate or eliminate the [threat]." 42 U.S.C. § 9601(23).

The specific activities selected by EPA – excavation, capping, disposal, consolidation, groundwater monitoring, use of environmental restrictions and easements, and treatment – all may be properly performed as removal actions.[63] 42 U.S.C. § 9604; 40 C.F.R. § 300.415.

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[63] See Hatco Corp. v. W.R. Grace & Co., 849 F. Supp. 931, 953 (D.N.J. 1994) (excavation and off-site disposal, isolation and capping of lagoons, and groundwater monitoring held to be

EPA's use of removal actions at the Site is also consistent with recent EPA guidance on this issue. See Exhibit 15, Guidance on Use of Non-Time Critical Removal Authority in Superfund Response Actions, February 14, 2000.

Finally, the removal actions represent EPA's compliance with the preamble to the National Contingency Plan, which calls for the EPA to balance the need to conduct a definitive characterization of site risks and alternative cleanup options with the need to implement protective measures quickly, and also endorses a bias toward early action to address site risks as early as possible.[64]

Because there is no showing of glaring error or even poor judgment, this Court should join the ranks of decisions affirming Agency determinations under the arbitrary and capricious standard. Ethyl Corp. v. EPA, 541 F.2d 1, 39-40 (D.C. Cir.) (En banc), cert. denied, 426 U.S. 941 (1976).

With respect to the appropriate procedural safeguards, the commenter does not even contest that EPA followed appropriate procedural safeguards for removal actions; moreover, EPA has long afforded the public multiple opportunities to be heard regarding Site investigations and cleanups.

EPA has provided more opportunity for public involvement than is required by law, regulation or policy. See Exhibit 8. For example, in July 1997, at a time when the governments

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removal actions); Environmental Health Coalition v. Dalton, No. 96-947-BTM (S.D. Calif. Aug. 13, 1996) slip op., aff'd 110 F.3d 68 (9th Cir. 1997) (affirming removal action including excavation, dredging, and consolidation on-site).

[64] 55 Fed. Reg. 8666, 8704 (March 8, 1990); Exhibit 2, Response 27.

were trying to engage GE in settlement negotiations, the Regional Administrator for EPA Region 1 and the Commissioner for MADEP met with local groups to discuss conditions at the Site and solicit input. On June 4, 1998, EPA made available the administrative record for the 1998 UAO and solicited comments from the public through July 10, 1998. See, 40 C.F.R. § 300.415(n)(2)(i) (must publish notice of availability of record) and 300.415(n)(2)(ii) (30 day public comment period from the time the administrative record is available, only if appropriate).

In the meantime, in July 1998, the governments and GE hosted a community input session regarding the issues being negotiated with GE. In May 1999, EPA published notice of interim work to be implemented, prior to entry of a consent decree, relating to the Allendale School, the Upper ½ Mile Reach, and On-Plant Consolidation Areas. There was a 30-day comment period on the interim work and EPA discussed the work and answered questions at the May 12, 1999 Citizens Coordinating Council meeting.

Accordingly, EPA's use of the removal action authority at the Site, designed to provide an expeditious and effective response to the substantial risks posed by Site PCB contamination, is proper, consistent with the NCP, furthers the purposes of CERCLA and is in the public interest.

The second additional comment that warrants brief mention relates to the Reissued RCRA Permit that was attached to the Consent Decree as Appendix G. Exhibit 2, Response 8. Certain commenters were concerned that the Permit did not include Connecticut as a participant in the RCRA corrective action process. Id. In response to this comment, the Reissued RCRA Permit was revised to add a Project Manager for Connecticut. Additional minor clerical revisions also were made. The revised version of the Reissued RCRA Permit is attached hereto

as Exhibit 17.

As demonstrated in the Response to Comments and the discussion of selected comments in this Memorandum, the comments do not disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper or inadequate. Therefore, the United States' motion for entry of the Decree should be granted.

C. THE COURT SHOULD ENTER THE CONSENT DECREE AS A FINAL JUDGMENT BECAUSE THERE IS NO JUST REASON FOR DELAY

The United States moves that the Decree be signed by the Court and entered as a final judgment pursuant to Fed. R. Civ. P. 54(b) and 58. See Decree, ¶ 225. There are three requirements for entry of a final judgment pursuant to Rule 54. First, the court must determine that the matter is a final judgment within the meaning of 28 U.S.C. § 1291. Next, the court must determine that there is no "just reason" for delay. Finally, the court must identify the factors it relied upon in making its decision. Consolidated Rail Corp. v. Fore River R.R., 861 F.2d 322, 325 (1st Cir. 1988).

The standards for Rule 54 are met in this case. First, the Consent Decree constitutes a judgment because it resolves "all liability of settling defendant[] on 'cognizable claim[s] for relief' brought by plaintiffs under CERCLA." United States v. Cannons Eng'g. Corp., 720 F.Supp. at 1053 (quoting Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7 (1980). Thus, the Decree is a final judgment because it constitutes an ultimate disposition of the claims of the governments as to GE. Id., (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 436 (1956)). See also, Consolidated Rail v. Fore River, 861 F.2d at 325 (judgment is final where it "leaves nothing for the Court to do but execute the judgment" citing Catlin v. United States, 324

U.S. 229, 233 (1945)).

Second, there is no just reason for delay. It is in the public interest to secure the expeditious and comprehensive cleanup program in the Decree, as well as the recovery of natural resource damages and the governments' costs. In addition, a final judgment "will advance the interests of judicial administration and public policy" and promote the statutory goal of providing the settling defendant with finality. Id. It is in the public interest to resolve the claims in this consolidated action and thereby also resolve the claims of Massachusetts and Connecticut.

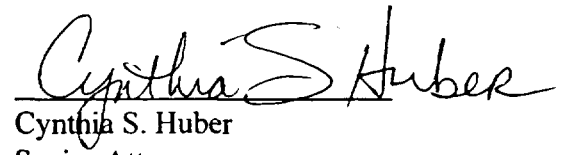
Therefore, the standards for entry of a final judgment pursuant to Rule 54(b) have been met. This Court should not only approve and sign the Consent Decree, but also should enter it as a final judgment and identify the bases for its decision in accordance with Rules 54 and 58.

IV. CONCLUSION

The Consent Decree executed by the United States, Massachusetts, Connecticut, the City, PEDA and GE is a fair and reasonable resolution of claims against GE, comports with the objectives of CERCLA, RCRA and the CWA and is in the public interest. The public comments submitted in this action do not show that entry of the Decree is improper, inadequate or not in the public interest. The Court should defer to the agreements reached in the Decree, and enter the Decree as a final judgment.

Respectfully submitted,

Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources
Division



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CERTIFICATE OF CONSULTATION

Counsel to the United States certify that they have conferred with counsel for the parties. As provided in the Decree, GE has consented to entry of the Decree. The Commonwealth of Massachusetts, the State of Connecticut, the City of Pittsfield and the Pittsfield Economic Development Authority assent to this motion and entry of the Consent Decree.

Cynthia S. Huber

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2000, I caused copies of the foregoing document and the attachment thereto to be served on counsel to the parties to this action and on counsel of the movants for intervention by first class mail.

Cynthia S. Huber